Supreme Court, U.S.
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91-678

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HERMAN GREY, *et al.*,
Petitioners,

v.

THE UNITED STATES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Claims Court may decline jurisdiction over a claim that is specifically referred to it for adjudication by a special jurisdictional act on grounds that are inconsistent with all special jurisdictional act decisions of this Court and of the Claims Court.

LIST OF PARTIES

The petitioners are the parties who were plaintiffs-appellants in the consolidated cases of *Herman Grey et al. v. United States* and *Carlton G. Abel et al. v. United States*, Nos. 91-5001 and 91-5002 in the United States Court of Appeals for the Federal Circuit. Petitioners other than Herman Grey, who were plaintiffs-appellants in No. 91-5001, are Pauline Grey, Raymond Juan, Georgene Morgan Seota, and Mary Joseph Manuel. There are 1,218 petitioners who were plaintiffs-appellants in *Carlton G. Abel*. They are listed in the appendix at pages 45a *et seq.*

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The judgment and opinion of the Court of Appeals are at App. 1a. The opinion was not reported. The opinion of the Claims Court in *Grey v. United States* (App. 3a) is reported at 21 Cl. Ct. 285.

STATEMENT ON JURISDICTION

The judgment of the Court of Appeals (App. 1a) was entered on May 24, 1991. A petition for Rehearing was denied on July 26, 1991 (App. 33a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(a), Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Public Law 100-512, 102 Stat. 2549, provides in pertinent part:

> (a)(1) There are extinguished—
>
> (A) All Allottees' claims against the United States for damages for deprivation of water rights through December 31, 1991; . . .
>
> (4) Consent is given to Allottees to maintain actions, individually or as a class, against the United States in the United States Claims Court pursuant to section 1491 of title 28, United States Code, to recover damages, if any, for the extinguishment of claims effected by subparagraph[s] (a)(1)(A) . . . of this section: . . . .

STATEMENT OF THE CASE

1. The petitioners are owners of allotted agricultural lands within the Salt River Pima-Maricopa Indian Reservation (the "reservation") in central Arizona directly east of the City of Scottsdale. Reservation farmlands constitute a very small portion of the 238,000 acre district that shares the Salt and Verde River flows that are conserved and distributed by the Salt River Project (the "Project"). The United States owns and controls the Project facilities and the United States defined the boundaries of the district that shares the water conserved and distributed by the Project. The entitlement of Project lands to share in Project water deliveries, which are subsidized by Project electric power revenues, is a substantial property right. (App. 37a-41a)

2. The United States, in its exercise of comprehensive control over water distribution to Project lands pursuant to federal reclamation laws, delivers considerably more water per acre to non-reservation Project lands than to reservation Project lands. Petitioners are required to

make up the difference by pumping groundwater which is considerably more costly than water distributed by the Project. There is no rational basis for treating petitioners' Project lands less favorably than equivalent non-reservation Project lands. (App. 41a-43a)

3. Petitioners, in their Claims Court actions, sought damages against the United States for added water costs incurred within the six-year limitations period as a result of being deprived of equivalent Project water distributions. They contended that jurisdiction was conferred on the Claims Court by Section 10(a)(4) of the Salt River Pima-Maricopa Water Rights Settlement Act of 1988, 102 Stat. 2549 (the "Settlement Act"), to hear and determine their claims on the merits. The Claims Court held that Section 10(a)(4) did not confer jurisdiction over the claims. Consideration of this jurisdictional question requires an inquiry into the purpose and intent of the Settlement Act and the Salt River Pima-Maricopa Indian Community Water Rights Settlement Agreement dated as of February 12, 1988 (the "Settlement Agreement") which the Settlement Act ratifies and implements. (App. 22a-29a, 43a)

4. Under the Settlement Agreement, the non-Indian settlement parties, i.e., cities and agricultural districts that receive Project water, cede a portion of their Project water entitlements to reservation lands, tribal and allotted. The effect of these cessions, which take effect in 1992, will be to make per-acre deliveries of Project water to reservation Project lands equivalent to per acre Project deliveries to the other Project lands.

As consideration for these cessions, the non-Indian settlement parties exacted a guaranty that they would not be sued, either by the Community or by the allottees, for having deprived reservation lands of a fair share of Project water before 1992. It was to be the function of the United States, through the Settlement Act, to effect this guaranty. (S. Hrg. 100-983, Joint Hearing before

the Senate Select Committee on Indian Affairs and House Committee on Interior and Insular Affairs, March 24, 1988, hereafter "S. Hrg. 100-983," 232-233, 259-261)

5. The original version of the Settlement Act was S. 2153, introduced by Arizona Senators DeConcini and McCain on March 4, 1988. Under the terms of S. 2153, the allottees' claims for damages for deprivation of Project water to allotted lands would be extinguished but they would be allowed to bring their claims for the extinguishment in the Claims Court. The Community's claim for deprivation of Project water to unallotted tribal lands would be discharged by a payment of $10 million which would be authorized for appropriation by Section 10(b)(2) of the Bill. This approach was changed at a joint hearing on the Bill before the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs held on March 24, 1988. At that hearing it was agreed that the $10 million authorization would be omitted and, like the allottees, the Community could instead bring its claim to the Claims Court. (S. Hrg. 100-983, 19-20, 73)

6. In the Bill as enacted, Section 10(a) recognizes the right of allottees to bring their claims in the Claims Court and Section 10(b) recognizes the right of the Community to bring its claim in the Claims Court. (S. Hrg. 100-983, pp. 2, 26 and 73).

7. *Grey v. United States* was filed in 1984, four years before the enactment of the Settlement Act. Prior to the Settlement Act, the basis upon which the *Grey* plaintiffs asserted jurisdiction was the Tucker Act, i.e., 28 U.S.C. § 1491, as interpreted by *United States v. Mitchell*, 463 U.S. 206 (1983). After enactment of the Settlement Act, the jurisdictional consent provision at Section 10(a)(4) became the jurisdictional basis for the allottees' claims. The Claims Court having denied class certification in *Grey*, 1,218 additional allottees filed Section

10(a)(4) claims in *Abel v. United States* on April 17, 1989. (App. 37a, 45a)

8. The Court of Appeals for the Federal Circuit affirmed the Claims Court's dismissal of *Grey* and *Abel* by reference to the Claims Court's opinion in *Grey* dated August 9, 1990, which directed entry of judgment for the United States. The Claims Court's opinion stated that Section 10(a)(4) did not confer jurisdiction on the Claims Court in these terms:

> "The [Settlement] Act does not in itself provide a jurisdictional basis for claims arising prior to 1991 that have no other statute mandating compensation."
>
> (App. 24a)
>
> "Absent some other statute providing a jurisdictional basis, it is highly unlikely that this court would find the Settlement Act established a substantive right in the tribe to recover."
>
> (App. 27a, n.12)

REASONS FOR GRANTING THE PETITION

I. THE JUDGMENT OF THE COURT OF APPEALS SANCTIONS A DEPARTURE BY THE CLAIMS COURT[1] FROM A COURSE OF PROCEEDINGS THAT HAS BEEN CONSISTENTLY FOLLOWED FOR MORE THAN A CENTURY.

The ruling below is literally the only instance in the history of the Claims Court[2] in which a claim referred

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[1] The term "Claims Court," when referring to decisions entered before the effective date of the Federal Courts Improvement Act of 1982, 96 Stat. 25, i.e. October 1, 1983, shall mean "Court of Claims."

[2] The Court of Claims was created by the act of February 24, 1855, Ch. 122, 10 Stat. 612, for the limited purpose of hearing claims referred to it by Congress and reporting back to Congress its findings in such claims. The Court was given the authority to enter appealable judgments by the acts of March 3, 1863, Ch. 92, 12 Stat. 765, and March 17, 1866, Ch. 19, 14 Stat. 9. The principal generic

for adjudication by a special jurisdictional act was declined on a jurisdictional ground other than *res judicata*.

The foregoing statement is based upon a case-by-case review of all special jurisdictional act cases that the petitioners were able to uncover. The principal tool for this research was the Lexis database of Claims Court decisions. This survey revealed that from 1880 to date there have been 239 reported special jurisdictional act cases in the Claims Court.[3] In 208 of these cases, the matter proceeded to judgment on the merits without a jurisdictional impediment. Table One, List A. Of the 31 cases that were dismissed for lack of jurisdiction, 17 were found not to be within the scope of the special jurisdictional grant, Table One, List B; and 14 were held to be barred by *res judicata*, Table One, List C.

There apparently has never before been a case in the history of the Claims Court before the decisions in *Grey* and *Abel* in which the Court declined jurisdiction on the ground that the special jurisdictional act was not by itself an adequate basis of jurisdiction.

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jurisdictional grant was the Tucker Act of March 3, 1887, 25 Stat. 505. See generally the "History of the Court of Claims" in volume 216 of the Court of Claims reports.

[3] This survey does not include Congressional reference cases that may be referred to the Claims Court by either house of Congress to hear and report back pursuant to 28 U.S.C. §§ 1492 and 1509. Congressional reference cases have been part of the Court's administrative function since they were first provided for in the act of March 3, 1883, Ch. 116, 22 Stat. 485.

II. THE JUDGMENT OF THE COURT OF APPEALS CONFLICTS WITH A TRADITION OF DECISIONS BY THIS COURT THAT SPECIAL JURISDICTIONAL ACT CASES SHOULD BE ADJUDICATED IF THEY ARE JUSTICIABLE.

Table Two lists the 35 special jurisdictional act decisions of this Court, dating from 1893 to 1980, which were uncovered through Lexis searches. These cases demonstrate the consistent resolve of this Court to give meaning and effect to special jurisdictional acts and to deny jurisdiction only upon settled principles of justiciability. Indeed, the only basis for denying jurisdiction in these cases has been that the claim is not within the scope of the special jurisdictional act. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945). This Court, in its particular deference to the will of Congress, has given effect to special jurisdictional acts which required the Claims Court to relitigate a claim that had previously been adjudicated. *Pope v. United States*, 323 U.S. 1 (1944); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

This Court has never imposed upon a special jurisdictional act claimant the burden of demonstrating that some particular statute or other source of law mandates compensation. The process in such cases is to determine whether a property right has been improperly impaired and, if it has been, to award compensation to the extent of the fair value of such property right. *New York Indians v. United States*, 170 U.S. 1 (1898); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *United States v. Creek Nation*, 295 U.S. 103 (1935).

CONCLUSION

For the reasons stated in this petition, the Court should issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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TABLE ONE

CLAIMS COURT SPECIAL JURISDICTIONAL ACT CASES WITH CITATIONS TO THE SPECIAL JURISDICTIONAL ACTS

A. Cases in which jurisdiction was founded on a special jurisdictional act and which proceeded to judgment on the merits without a jurisdictional impediment.

Boudinot v. United States, 18 Ct. Cl. Cl. 716 (1883); act of June 4, 1880, 21 Stat. 123.

Choctaw Nation v. United States, 19 Ct. Cl. 243 (1884); act of March 3, 1881, 21 Stat. 504.

Choctaw Nation v. United States, 21 Ct. Cl. 59 (1886); act of March 3, 1881, 21 Stat. 504.

Talbert v. United States, 25 Ct. Cl. 141 (1890); act of June 30, 1886, 24 Stat. 822.

Citizen Indians of the Weas v. United States, 26 Ct. Cl. 323 (1891); act of March 2, 1889, 25 Stat. 1013.

Western Cherokee Indians v. United States, 27 Ct. Cl. 1 (1891); act of February 25, 1889, 25 Stat. 694.

Potawatamie Indians v. United States, 27 Ct. Cl. 403 (1892); act of March 19, 1890, 26 Stat. 24.

Journeycake v. Cherokee Nation & United States, 28 Ct. Cl. 281 (1893); act of October 1, 1890, 26 Stat. 636.

Blackfeather v. Uinted States, 28 Ct. Cl. 447 (1893); act of October 1, 1890, 26 Stat. 636.

Whitmere v. Cherokee Nation and United States, 30 Ct. Cl. 138 & 180 (1895); act of October 1, 1890, 26 Stat. 636.

New York Indians v. United States, 30 Ct. Cl. 413 (1895); act of January 28, 1893, 27 Stat. 426.

Shewson v. United States, 31 Ct. Cl. 192 (1896); act of March 2, 1895, 28 Stat. 895.

Choctaws v. United States, 34 Ct. Cl. 17 (1899); act of March 2, 1985, 28 Stat. 876.

Fond du Lac Band of Chippewa v. United States, 34 Ct. Cl. 426 (1899); act of June 7, 1897, 30 Stat. 89.

Phineas Pam-to-Pee, v. United States, 36 Ct. Cl. 427 (1901); act of March 19, 1890, 26 Stat. 24.

United States v. Choctaw Nation, 38 Ct. Cl. 558 (1903); act of July 1, 1902, 32 Stat. 642.

Sisseton & Wahpeton Bands v. United States, 39 Ct. Cl. 172 (1904); act of March 3, 1901, 31 Stat. 1078.

Cherokee Nation v. United States, 40 Ct. Cl. 252 (1905); act of July 1, 1902, 32 Stat. 726.

In Matter of Persons Claiming Rights in Cherokee Nation, 40 Ct. Cl. 411 (1905); act of March 3, 1905, 33 Stat. 1071.

New York Indians v. United States, 40 Ct. Cl. 448 (1905); act of January 28, 1893, 27 Stat. 426.

New York Indians v. United States, 41 Ct. Cl. 462 (1906); act of January 28, 1893, 27 Stat. 426.

Sisseton & Wahpeton Bands v. United States, 42 Ct. Cl. 416 (1907); act of March 3, 1901, 31 Stat. 1078.

Ottawa & Chippewa Indians v. United States, 42 Ct. Cl. 240 (1907); act of March 3, 1905, 33 Stat. 108.

Ottawa & Chippewa Indians v. United States, 42 Ct. Cl. 518 (1907); act of March 3, 1905, 33 Stat. 108.

Bailey v. United States and Osage Nation, 43 Ct. Cl. 353 (1908); act of June 21, 1906, 34 Stat. 366.

Butler and Vale v. United States, 43 Ct. Cl. 497 (1908); act of June 21, 1906, 34 Stat. 378.

Muskrat v. United States, 44 Ct. Cl. 137 (1909); act of March 1, 1907, 34 Stat. 1015 (1028).

Kiskadden v. United States, 44 Ct. Cl. 205 (1909), act of March 27, 1902, 32 Stat. 243.

Whitmere, Trustee v. Cherokee Nation & United States, 44 Ct. Cl. 453 (1909); act of October 1, 1890, 26 Stat. 636.

Peel v. Choctaw Nation and United States, 45 Ct. Cl. 154 (1910); act of February 18, 1907, 34 Stat. 2415.

Eastern Cherokee v. United States, 45 Ct. Cl. 229 (1910); act of July 1, 1902, 32 Stat. 716.

Sac & Fox Indians v. United States, 45 Ct. Cl. 287 (1910); act of March 1, 1907, 34 Stat. 1055.

Rogers v. Osage Nation, 45 Ct. Cl. 388 (1910); act of June 21, 1906, 34 Stat. 365.

Ute Indians v. United States, 45 Ct. Cl. 440 (1910), modified 46 Ct. Cl. 225 (1911); act of March 3, 1909, 35 Stat. 788.

The Globe Works v. United States, 45 Ct. Cl. 497 (1910); act of May 27, 1902, 32 Stat. 244.

Green v. Menominee Tribe of Indians, 46 Ct. Cl. 68 (1911); act of May 29, 1908, 35 Stat. 444.

Snare & Triest Co. v. United States, 46 Ct. Cl. 109 (1911); act of February 26, 1907, 34 Stat. 2567.

Whitmere, Trustee v. United States & Cherokee Nation, 46 Ct. Cl. 227 (1911); act of October 1, 1890, 26 Stat. 636.

Mille Lac Chippewas v. United States, 46 Ct. Cl. 424 (1911); act of February 15, 1909, 35 Stat. 619.

H.W. Goodrich, Receiver v. United States, 47 Ct. Cl. 200 (1912); act of February 24, 1905, 33 Stat. 743.

Mille Lac Chippewas v. United States, 47 Ct. Cl. 415 (1912); act of February 15, 1909, 35 Stat. 619.

Lincoln v. United States, 49 Ct. Cl. 300 (1914); act of March 3, 1911, 36 Stat. 1087.

Snare & Triest Co. v. United States, 50 Ct. Cl. 201 (1915); act of September 15, 1914, 38 Stat. 1457.

H.W. Goodrich v. United States, 51 Ct. Cl. 1 (1915); act of February 24, 1905, 33 Stat. 743.

Mille Lac Band of Chippewa v. United States, 51 Ct. Cl. 400 (1916); act of February 15, 1909, 35 Stat. 619.

State of Mass. v. United States, 52 Ct. Cl. 311 (1917); act of July 11, 1916, 39 Stat. 355.

Otoe & Missouria Indians v. United States, 52 Ct. Cl. 424 (1917); act of June 22, 1910, 36 Stat. 580.

Yankton Sioux v. United States, 53 Ct. Cl. 67 (1917); act of April 4, 1910, 36 Stat. 269.

Omaha Tribe of Indians v. United States, 53 Ct. Cl. 549 (1918); act of June 22, 1910, 36 Stat. 580.

Garland v. Choctaw Nation, 54 Ct. Cl. 55 (1919); act of May 29, 1908, 35 Stat. 445.

Irby v. United States, 57 Ct. Cl. 60 (1922); act of June 4, 1920, 41 Stat. 1470.

Medawakanton Sioux v. United States, 57 Ct. Cl. 357 (1922); act of March 4, 1917, 39 Stat. 1195.

Sisseton & Wahpeton Sioux v. United States, 58 Ct. Cl. 302 (1923); act of March 17, 1917, 39 Stat. 47.

Heirs of Garland v. Choctaw Nation, 59 Ct. Cl. 768 (1924); act of May 29, 1908, 35 Stat. 445.

Pitchlynn v. Choctaw Nation, 59 Ct. Cl. 796 (1924); act of June 21, 1906, 34 Stat. 325.

Leavitt v. United States, 60 Ct. Cl. 952 (1925); act of January 10, 1925, 43 Stat. 1545.

Yankton Sioux v. United States, 61 Ct. Cl. 40 (1925); act of June 3, 1920, 41 Stat. 738.

Stockbridge Tribe of Indians v. United States, 61 Ct. Cl. 472 (1926); act of June 7, 1924, 43 Stat. 644.

McMurray v. Choctaw Nation, 62 Ct. Cl. 458 (1926); act of May 25, 1918, 40 Stat. 561.

Livingston v. United States, 64 Ct. Cl. 314 (1927); act of March 3, 1927, 44 Stat. 1835.

Export Oil Corp. v. United States, 64 Ct. Cl. 342 (1928); act of February 19, 1925, 43 Stat. 1574.

A. S. Rosenthal Co. v. United States, 64 Ct. Cl. 643 (1928); act of December 16, 1926, 44 Stat. 1761.

Yankton Sioux v. United States, 65 Ct. Cl. 427 (1928); act of January 9, 1925, 43 Stat. 730.

State of Rhode Island v. United States, 65 Ct. Cl. 690 (1928); act of February 24, 1925, 43 Stat. 964.

Osage Tribe of Indians v. United States, 66 Ct. Cl. 64 (1928); act of February 6, 1921, 41 Stat. 1097.

Bodkin v. United States, 67 Ct. Cl. 281 (1929); act of March 4, 1927, 44 Stat. 1845.

Southern Pacific Co. v. United States, 68 Ct. Cl. 223 (1929); act of May 26, 1924, 43 Stat. 171.

Stanton & Jones v. United States, 68 Ct. Cl. 379 (1929); act of February 12, 1927, 44 Stat. 1768.

Iowa Tribe of Indians v. United States, 68 Ct. Cl. 585 (1929); act of April 28, 1920, 41 Stat. 585.
Garrett v. United States, 70 Ct. Cl. 304 (1930); act of March 1, 1929, 45 Stat. 2345.
Ericsson v. United States, 70 Ct. Cl. 401 (1930); act of February 23, 1927, 44 Stat. 1788.
T. D. Randall & Co. v. United States, 71 Ct. Cl. 152 (1930); act of March 2, 1929, 45 Stat. 2358.
Ft. Berthold Indians v. United States, 71 Ct. Cl. 308 (1930); act of February 11, 1920, 41 Stat. 404.
Delaware Tribe v. United States, 72 Ct. Cl. 483 (1931); act of February 7, 1925, 43 Stat. 812.
Delaware Tribe v. United States, 72 Ct. Cl. 525 (1931); act of February 7, 1925, 43 Stat. 812.
Butler Lumber Co. v. United States, 73 Ct. Cl. 270 (1931); act of March 3, 1927, 44 Stat. 1812.
Royal Holland Lloyd v. United States, 73 Ct. Cl. 722 (1932); act of March 3, 1927, 44 Stat. 1838.
John L. Alcock & Co. v. United States, 74 Ct. Cl. 308 (1932); act of May 28, 1928, 45 Stat. 2001.
Delaware Tribe v. United States, 74 Ct. Cl. 368 (1932); act of February 7, 1925, 43 Stat. 812.
Pearson v. United States, 75 Ct. Cl. 375 (1932); act of February 25, 1929, 45 Stat. 2327.
Chickasaw Nation v. United States, 75 Ct. Cl. 426 (1932); act of June 7, 1924, 43 Stat. 537.
Grissinger v. United States, 77 Ct. Cl. 106 (1933); act of April 18, 1924, 43 Stat. 1363.
Creek Nation v. United States, 77 Ct. Cl. 159 (1933); act of May 24, 1924, 43 Stat. 139.
Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347 (1933); act of March 2, 1927.
Seminole Nation v. United States, 78 Ct. Cl. 455 (1933); act of May 20, 1924, 43 Stat. 133.
Creek Nation v. United States, 78 Ct. Cl. 474 (1933); act of May 24, 1924, 43 Stat. 139.
Kansas or Kaw Indians v. United States, 80 Ct. Cl. 264 (1934); act of March 3, 1925, 43 Stat. 1133.

Chippewa Indians and Red Lake Band v. United States, 80 Ct. Cl. 410 (1935); act of May 14, 1926, 44 Stat. 555.

Choctaw Nation v. United States, 81 Ct. Cl. 1 (1935); act of June 7, 1924, 43 Stat. 568.

Shoshone Tribe of Indians v. United States, 81 Ct. Cl. 23 (1935); act of March 3, 1927, 44 Stat. 1349.

Choctaw & Chickasaw Nations v. United States, 81 Ct. Cl. 63 (1935); act of June 7, 1924, 43 Stat. 537.

Blackfeet Nation v. United States, 81 Ct. Cl. 101 (1935); act of March 13, 1924, 43 Stat. 21.

Crow Nation v. United States, 81 Ct. Cl. 238 (1935); act of July 3, 1926, 44 Stat. 807.

Seminole Nation v. United States, 82 Ct. Cl. 135 (1935); act of May 20, 1924, 43 Stat. 133.

Barlow v. United States, 82 Ct. Cl. 360 (1936); act of March 3, 1927, 44 Stat. 1844.

Choctaw Nation v. United States, 83 Ct. Cl. 140 (1936); act of June 7, 1924, 43 Stat. 537.

Choctaw Nation v. United States, 83 Ct. Cl. 140 (1936); act of June 7, 1924, 43 Stat. 568.

Sioux Tribe of Indians v. United States, 84 Ct. Cl. 16 (1937); act of June 3, 1920, 41 Stat. 738.

Cherokee Nation v. United States, 85 Ct. Cl. 76 (1937); act of March 19, 1924, 43 Stat. 27.

Sioux Tribe v. United States, 85 Ct. Cl. 181 (1937); act of June 3, 1920, 41 Stat. 738.

Shoshone Indians v. United States, 85 Ct. Cl. 331 (1937); act of March 3, 1927, 44 Stat. 1349.

Klamath Indians v. United States, 85 Ct. Cl. 451 (1937); act of May 26, 1920, 41 Stat. 623.

Stubbs v. United States, 86 Ct. Cl. 152 (1937); act of June 14, 1935, 49 Stat. 2078.

Sioux Tribe of Indians v. United States, 86 Ct. Cl. 299 (1938), modified 86 Ct. Cl. 614 (1938); act of June 3, 1920, 41 Stat. 738.

Choctaw Nation v. United States, 87 Ct. Cl. 91 (1938); act of June 7, 1924, 43 Stat. 537.

Coos Bay Indian Tribe v. United States, 87 Ct. Cl. 143 (1938); act of February 23, 1929, 45 Stat. 1256.

Barlow v. United States, 87 Ct. Cl. 287 (1937); act of March 3, 1927, 44 Stat. 1844.

Chippewa Indians of Minnesota v. United States, 88 Ct. Cl. 1 (1938); act of May 14, 1926, 44 Stat. 555.

Eastern Cherokees v. United States, 88 Ct. Cl. 452 (1939); act of April 25, 1932, 47 Stat. 137.

Sioux Tribe of Indians v. United States, 89 Ct. Cl. 31 (1939); act of June 3, 1920, 41 Stat. 738.

P.L. Andrews Corp. v. United States, 86 Ct. Cl. 282 (1938); act of June 20, 1936, 49 Stat. 2341.

Bratses v. United States, 86 Ct. Cl. 601 (1938); act of May 27, 1933, 49 Stat. 2348.

Shearer v. United States, 87 Ct. Cl. 40 (1938); December 17, 1930, 46 Stat. 1970.

Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians v. United States, 86 Ct. Cl. 614 (1938); act of May 26, 1920, 41 Stat. 623.

Carden v. United States, 87 Ct. Cl. 189 (1938); act of June 13, 1934, 48 Stat. 1386.

Coos Bay Indian Tribes v. United States, 87 Ct. Cl. 143 (1938); act of February 23, 1929, 45 Stat. 1256, as amended by act of June 14, 1932, 47 Stat. 307.

Gates v. United States, 87 Ct. Cl. 358 (1938); act of August 7, 1935, 49 Stat. 2112.

McShain v. United States, 87 Ct. Cl. 601 (1938); act of June 16, 1934, 48 Stat. 974, as amended by act of June 25, 1938.

Chippewa Indians v. United States, 88 Ct. Ct. 1 (1939); act of May 14, 1926, 44 Stat. 555.

Eastern Cherokees v. United States, 88 Ct. Cl. 452, (1939); act of April 25, 1932, 47 Stat. 137.

Mansfield v. United States, 89 Ct. Cl. 12 (1939); act of August 19, 1935, 49 Stat. 2148.

Hampton & Branchville R.R. Co. v. United States, 89 Ct. Cl. 117 (1939); act of August 14, 1935, 49 Stat. 2140.

Virginia Engineering Co. v. United States, 89 Ct. Cl. 457 (1939); act of May 1, 1936, 49 Stat. 2257.

Hubbard v. United States, 92 Ct. Cl. 381 (1940); act of June 15, 1936, 49 Stat. 2316.

Randall v. United States, 90 Ct. Cl. 325 (1940); act of May 26, 1936, 49 Stat. 2305.

Chippewa Indians v. United States, 91 Ct. Cl. 97 (1940); act of May 14, 1926, as amended by act of April 11, 1928, 45 Stat. 423.

Goltra v. United States, 91 Ct. Cl. 42 (1940); act of April 18, 1934, 48 Stat. 1322.

Creek Nation v. United States, 92 Ct. Cl. 346 (1941); act of May 24, 1924, 43 Stat. 139.

Fauber v. United States, 93 Ct. Cl. 11 (1941); act of March 3, 1931, 46 Stat. 2134.

Nolan v. United States, 93 Ct. Cl. 453 (1941); act of May 15, 1937; 50 Stat. 964.

Sioux Tribe v. United States, 94 Ct. Cl. 150 (1941); act of June 3, 1920, 41 Stat. 738.

George B. Marx, Inc. v. United States, 93 Ct. Cl. 628 (1941); act of June 25, 1936, 49 Stat. 2362.

Seminole Nation v. United States, 94 Ct. Cl. 240 (1941); act of August 16, 1937, 50 Stat. 650, act of February 19, 1929, 45 Stat. 1229; act of May 19, 1926, 44 Stat. 568; act of May 20, 1924, 43 Stat. 133; act of August 12, 1935, 49 Stat. 571.

The Oyster Cases, 94 Ct. Cl. 397 (1941); act of January 20, 1936, 49 Stat. 2209.

Whitman v. United States, 95 Ct. Cl. 741 (1942); act of June 25, 1938, 52 Stat. 1399.

Norfolk So. R.R. Co. v. United States, 96 Ct. Cl. 357 (1942); act of February 11, 1936, 49 Stat. 2217.

Schroeder Besse Oyster Co., Inc. v. United States, 95 Ct. Cl. 729 (1942); act of August 30, 1935, 49 Stat. 1028, 1049.

Creek Nation v. United States, 97 Ct. Cl. 602 (1942); act of May 24, 1924, 43 Stat. 139.

Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942); act of June 3, 1920, 41 Stat. 738.

Yankton Sioux v. United States, 97 Ct. Cl. 56 (1942); act of June 3, 1920, 41 Stat. 738.

Indians of California v. United States, 98 Ct. Cl. 583 (1943); act of May 18, 1928, 45 Stat. 602, as amended by Act of April 29, 1930, 46 Stat. 259.

Nolan Bros., Inc. v. United States, 98 Ct. Cl. 41 (1943); act of July 23, 1937; 50 Stat. 533.

Mack Copper Co. v. United States, 97 Ct. Cl. 451 (1942); act of April 20, 1939, 53 Stat. 452.

Grier-Lowrance Const. Co. v. United States, 98 Ct. Cl. 434 (1943); act of May 6, 1937, 50 Stat. 955.

Merritt-Chapman & Whitney Corp. v. United States, 99 Ct. Cl. 498 (1943); act of July 23, 1937, 50 Stat. 533.

Pope v. United States, 100 Ct. Cl. 375 (1944); act of February 27, 1942, 56 Stat. 1122.

Menominee Tribe v. United States, 101 Ct. Cl. 10 (1944); and 101 Ct. Cl. 22 (1944); act of September 3, 1935, 49 Stat. 1085, as amended by act of April 8, 1938, 52 Stat. 208.

Shearer v. United States, 101 Ct. Cl. 196 (1944); act of December 17, 1970, 46 Stat. 1970.

International Arms & Fuze Co. v. United States, 101 Ct. Cl. 297 (1944); act of June 15, 1917, 40 Stat. 182.

Howard v. United States, 101 Ct. Cl. 823 (1944); act of June 9, 1942, 56 Stat. 1184.

Creech v. United States, 102 Ct. Cl. 290 (1945); act of June 25, 1938, 52 Stat. 1399.

Gregory v. United States, 102 Ct. Cl. 642 (1944); act of May 9, 1941, 55 Stat. 904.

Seminole National v. United States, 102 Ct. Cl. 565 (1945); act of August 16, 1937, 50 Stat. 650.

Chickasaw Nation v. United States, 103 Ct. Cl. 1 (1945); act of June 7, 1924, 43 Stat. 537.

Cherokee Nation v. United States, 102 Ct. Cl. 720 (1945); act of March 19, 1924, 43 Stat. 27.

Quinaielt Tribe v. United States, 102 Ct. Cl. 822 (1945); act of February 12, 1925, 43 Stat. 886.

Pope v. United States, 104 Ct. Cl. 496 (1945); act of February 27, 1942, 52 Stat. 1122.

Hubard v. United States, 105 Ct. Cl. 395 (1946); act of June 25, 1938, 52 Stat. 1403.

Beacon Oyster Co. v. United States, 105 Ct. Cl. 227 (1946); act of June 9, 1942, 56 Stat. 1183.

Lamborn & Co. v. United States, 106 Ct. Cl. 703 (1946); act of October 14, 1940, 54 Stat. 1389.

Beard v. United States, 110 Ct. Cl. 1 (1948); act of September 24, 1940, 54 Stat. 1361.

James Stewart Corp. v. United States, 108 Ct. Cl. 596 (1947); act of July 23, 1937, 50 Stat. 533.

Cherokee Indians v. United States, 114 Ct. Cl. 716 (1949); act of August 13, 1946, 60 Stat. 1049.

Alcea Band of Tillamooks v. United States, 115 Ct. Cl. 463 (1950); act of August 26, 1935, 49 Stat. 801.

Silas Mason Co. v. United States, 116 Ct. Cl. 1 (1950); act of July 3, 1948, 62 Stat. 1421.

Borg-Warner Corp. v. United States, 117 Ct. Cl. 1 (1950); act of August 4, 1939, 53 Stat. 1491.

Menominee Tribe of Indians v. United States, 117 Ct. Cl. 442 (1950), and 118 Ct. Cl. 290 (1951); act of September 3, 1935, 49 Stat. 1085, as amended by act of April 8, 1938, 52 Stat. 208.

Goltra v. United States, 119 Ct. Cl. 217 (1951); act of April 18, 1934, 48 Stat. 1322.

Hemptstead Warehouse Corp. v. United States, 120 Ct. Cl. 291 (1951); act of April 25, 1949, 62 Stat. 1350.

Confederated Bands of Ute Indians v. United States, 120 Ct. Cl. 609 (1951); act of June 28, 1938, 52 Stat. 1209.

Sedgwick County v. United States, 123 Ct. Cl. 304 (1952); act of March 19, 1951, 65 Stat. 5.

Mason v. United States, 123 Ct. Cl. 647 (1952); act of April 22, 1949, 63 Stat. 1989.

Breinig Bros., Inc. v. United States, 124 Ct. Cl. 645 (1953); act of August 24, 1949, 63 Stat. 1169.

Chahroudi v. United States, 124 Ct. Cl. 792 (1953); act of August 28, 1950, 64 Stat. 195.

Sioux Tribe of Indians v. United States, 125 Ct. Cl. 439 (1953); act of June 3, 1920, 41 Stat. 738.

Chickasaw Nation v. United States, 132 Ct. Cl. 359 (1955); act of June 7, 1924, 43 Stat. 537.

California v. United States, 127 Ct. Cl. 624 (1954); act of September 25, 1950, 64 Stat. 1032.

Smith v. United States, 134 Ct. Cl. 163 (1956); act of June 29, 1953, 67 Stat. A28.

Central Eureka Mining Co. v. United States, 134 Ct. Cl. 1 (1956); act of July 14, 1952, 66 Stat. 605.

Birkelund v. United States, 135 Ct. Cl. 503 (1956); act of January 3, 1951, 64 Stat. 273.

Forest Lumber Co. v. United States, 135 Ct. Cl. 488 (1956); act of January 3, 1951, 64 Stat. 272.

Zachariassen v. United States, 136 Ct. Cl. 63 (1956); act of June 29, 1936, 49 Stat. 2368.

Uintah & White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1 (1957); and 158 Ct. Cl. 705 (1962); act of June 28, 1938, 52 Stat. 1209, as amended by act of July 15, 1941, 55 Stat. 593; act of June 22, 1943, 57 Stat. 160; act of June 11, 1946, 60 Stat. 255; act of August 13, 1946, 60 Stat. 1049.

Reynolds v. United States, 141 Ct. Cl. 211 (1958); act of August 27, 1954, 68 Stat. 226.

Anderson v. United States, 146 Ct. Cl. 691 (1959); act of June 27, 1956, 70 Stat. 95.

Tlingit & Huida Nations v. United States, 147 Ct. Cl. 315 (1959); act of June 19, 1935, 49 Stat. 388.

Wah Change Corp. v. United States, 151 Ct. Cl. 41 (1960); act of March 28, 1955, 68 Stat. 288.

Kalinowski v. United States, 151 Ct. Cl. 172 (1960); act of March 15, 1958, 72 Stat. 15.

Sonoda v. United States, 154 Ct. Cl. 130 (1961); act of July 2, 1948, 62 Stat. 1231, as amended by act of July 17, 1951, 65 Stat. 192, and act of July 9, 1956, 70 Stat. 513.

Warneke v. United States, 156 Ct. Cl. 684 (1962); act of July 25, 1958, 72 Stat. 70.

Jones & Sears, Inc. v. United States, 158 Ct. Cl. 162 (1962); act of May 24, 1956, 70 Stat. 73.

United Foundation Corp. v. United States, 158 Ct. Cl. 41 (1962); act of June 20, 1958, 72 Stat. 45.

Princess Anne County School Board, 158 Ct. Cl. 707 (1962); act of September 15, 1961, 75 Stat. 520.

Aragona Const. Co. v. United States, 165 Ct. Cl. 382 (1964); act of September 2, 1958, 72 Stat. 213.

Confederated Salish & Kootenai Tribes v. United States, 167 Ct. Cl. 405 (1964); 193 Ct. Cl. 801 (1971); and 199 Ct. Cl. 599 (1972); act of July 30, 1946, 60 Stat. 715.

Confederated Salish & Kootenai Tribes v. United States, 173 Ct. Cl. 398 (1966); act of July 30, 1946, 60 Stat. 715.

Navajo Tribe v. United States, 176 Ct. Cl. 502 (1966); and 177 Ct. Cl. 365 (1966); act of June 27, 1947, 61 Stat. 189, as amended by act of July 29, 1954, 68 Stat. 580.

Lipp v. United States, 181 Ct. Cl. 355 (1967); act of March 1, 1966, 80 Stat. 1615.

County of Sarpy v. United States, 181 Ct. Cl. 666 (1967); act of August 13, 1964, 78 Stat. 399.

Confederated Salish & Kootenai Tribes v. United States, 181 Ct. Cl. 739 (1967); and 181 Ct. Cl. 1201 (1967); act of July 30, 1946, 60 Stat. 715.

Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130 (1968); act of June 19, 1935, 49 Stat. 388, as amended by act of June 5, 1942, 56 Stat. 323, and act of June 4, 1945, 59 Stat. 231.

Confederated Salish & Kootenai Tribes v. United States, 185 Ct. Cl. 794 (1968); and 186 Ct. Cl. 947 (1968); act of July 30, 1946, 60 Stat. 715, 716.

Mizokami v. United States, 188 Ct. Cl. 736 (1969); act of October 6, 1964, 78 Stat. 1195.

Blackfeet Tribe v. United States, 228 Ct. Cl. 226 (1981); act of October 9, 1980, 94 Stat. 1711.

Three Affiliated Tribes v. United States, 94 Stat. 1711 (1980); act of October 9, 1980.

Minnesota Chippewa Tribe v. United States, 229 Ct. Cl. 776 (1982); act of May 14, 1926, 44 Stat. 555, as amended by act of April 11, 1928, 45 Stat. 423, and act of June 18, 1934, 48 Stat. 979.

Zuni Indian Tribe v. United States, 12 Ct. Cl. 607 (1987); act of May 15, 1978, 92 Stat. 244.

Zuni Indian Tribe v. United States, 16 Ct. Cl. 670 (1989); act of May 15, 1978, 92 Stat. 244.

B. Cases that were dismissed for lack of jurisdiction because petitioner' claims exceeded the scope of the special jurisdictional act.

Eastern Band of Cherokees v. Cherokee Nation West and United States, 19 Ct. Cl. 35 (1983); act of March 3, 1883, 22 Stat. 585, and 20 Ct. Cl. 449 (1885).

Delaware Indians v. Cherokee Nation, 38 Ct. Cl. 234 (1903); act of June 28, 1898, 30 Stat. 490.

Eastern Cherokees v. United States, 45 Ct. Cl. 104 (1910); act of July 1, 1902, 32 Stat. 726, and act of March 3, 1903, 32 Stat. 996.

Green v. Menominee Tribe of Indians, 47 Ct. Cl. 281 (1912); act of May 29, 1908, 35 Stat. 444.

Turner v. United States and Creek Nation, 51 Ct. Cl. 125 (1916); act of May 29, 1908, 35 Stat. 444.

Estate of Winton v. Amos, 51 Ct. Cl. 284 (1916); act of April 26, 1906, 34 Stat. 140, and act of May 29, 1908, 35 Stat. 457.

Creek Nation v. United States, 63 Ct. Cl. 270 (1927); act of May 24, 1924, 43 Stat. 139.

Creek Nation v. United States, 77 Ct. Cl. 226 (1933); act of May 24, 1924, 43 Stat. 139.

Duwamish Indians v. United States, 79 Ct. Cl. 530 (1934); act of February 12, 1925, 43 Stat. 886.

McCalib v. United States, 83 Ct. Cl. 79 (1936); act of June 28, 1934, 48 Stat. 1467.

Delaware Tribe of Indians v. United States, 84 Ct. Cl. 535 (1937); act of February 7, 1925, 43 Stat. 812, and act of June 4, 1936, 49 Stat. 1459.

Chippewa Indians of Minnesota v. United States, 87 Ct. Cl. 1 (1938); act of May 14, 1926, 44 Stat. 555.

Wichita Indians v. United States, 89 Ct. Cl. 378 (1939); act of June 4, 1924, 43 Stat. 366.

W. A. Merrill Sons & Co. v. United States, 102 Ct. Cl. 63 (1944); act of June 25, 1938, 52 Stat. 1197.

Tlingit Nation v. United States, 102 Ct. Cl. 209 (1944); act of June 5, 1942, 49 Stat. 388, amended by 36 Stat. 323.

Alcea Band of Tillamooks v. United States, 103 Ct. Cl. 494 (1945); act of August 26, 1935, 49 Stat. 801.

Central Eureka Mining Co. v. United States, 134 Ct. Cl. 130 (1956), reversed *sub nom. United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); act of July 14, 1952, 66 Stat. 605.

C. Cases that were dismissed for lack of jurisdiction because petitioners' claims were barred by *res judicata*.

Cherokee Nation v. United States, 59 Ct. Cl. 862 (1924); act of March 3, 1919, 40 Stat. 1316.

Stockbridge Tribe of Indians v. United States, 63 Ct. Cl. 268 (1927); act of June 7, 1924, 43 Stat. 644.

Colgate v. United States, 66 Ct. Cl. 667 (1929); act of March 3, 1927, 44 Stat. 1807.

Cherokee Nation v. United States, 80 Ct. Cl. 1 (1935); act of March 19, 1924, 43 Stat. 27.

Klamath & Moadoc Tribes v. United States, 81 Ct. Cl. 79 (1935); act of May 26, 1920, 41 Stat. 623.

Eastern or Emigrant Cherokees v. United States, 82 Ct. Cl. 180 (1935); act of April 25, 1932, 47 Stat. 137.

Cherokee Nation v. United States, 82 Ct. Cl. 456 (1936); act of March 19, 1924, 43 Stat. 27.

Western Cherokees v. United States, 82 Ct. Cl. 566 (1936); act of April 25, 1932, 47 Stat. 137.

Seminole Nation v. United States, 90 Ct. Cl. 151 (1940); act of May 20, 1924, 43 Stat. 133.

Cherokee Indians v. United States, 116 Ct. Cl. 665 (1950); act of August 13, 1946, 60 Stat. 1049.

Assiniboine Indian Tribe v. United States, 128 Ct. Cl. 617 (1954); act of March 2, 1927, 44 Stat. 1263.

Brinker-Johnson Co. v. United States, 144 Ct. Cl. 489 (1959); act of July 14, 1952, 66 Stat. 605.

Minnesota Chippewa Tribe v. United States, Slip Opinion, March 18, 1980; act of May 14, 1926, 44 Stat. 555.

Red Lake Band v. United States, Slip Opinion, March 21, 1980; act of May 14, 1926, 44 Stat. 555.

TABLE TWO

UNITED STATES SUPREME COURT DECISIONS IN SPECIAL JURISDICTIONAL ACT CASES WITH CITATIONS TO THE SPECIAL JURISDICTIONAL ACTS

United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); act of March 13, 1978, 92 Stat. 153.

United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); act of July 14, 1952, 66 Stat. 605.

United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946); interest on award denied at 341 U.S. 48 (1951); act of August 26, 1935, 49 Stat. 801.

Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945); act of February 28, 1929, 45 Stat. 1407.

Pope v. United States, 323 U.S. 1 (1944); act of February 27, 1942, 56 Stat. 1122.

Creek Nation v. United States, 318 U.S. 629 (1943); act of May 20, 1924, 43 Stat. 133, and act of May 24, 1924, 43 Stat. 139.

Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943); act of June 7, 1924, 43 Stat. 537, as amended by 44 Stat. 568, and 45 Stat. 1229.

Seminole Nation v. United States, 316 U.S. 286 (1942); act of August 16, 1937, 50 Stat. 650.

Seminole Nation v. United States, 316 U.S. 310 (1942); act of August 16, 1937, 50 Stat. 650.

Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942); act of June 3, 1920, 41 Stat. 738.

United States v. Goltra, 312 U.S. 203 (1941); act of April 18, 1934, 48 Stat. 1322.

Chippewa Indians of Minnesota v. United States, 305 U.S. 479 (1939); act of June 22, 1936, 49 Stat. 1826.

United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); act of March 3, 1927, 44 Stat. 1349.

United States v. Klamath and Moadoc Tribes of Indians, 304 U.S. 119 (1938); act of May 15, 1936, 49 Stat. 1276.

Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937); act of March 3, 1927, 44 Stat. 1349.

Klamath and Moadoc Tribe of Indians v. United States, 296 U.S. 244 (1935); act of May 26, 1920, 41 Stat. 623.

United States v. Creek Nation, 295 U.S. 103 (1935); act of May 24, 1924, 43 Stat. 139.

Colgate v. United States, 280 U.S. 43 (1929); act of March 3, 1927, 44 Stat. 1807.

Sisseton and Wahpeton Bands of Sioux Indians v. United States, 277 U.S. 424 (1928); act of March 4, 1927, 44 Stat. 1847.

Winton v. Amos, 255 U.S. 373 (1921); act of April 26, 1906, 34 Stat. 137, as amended by act of May 29, 1908, 35 Stat. 444.

United States v. Omaha Tribe of Indians, 253 U.S. 275 (1920); act of June 22, 1910, 36 Stat. 580.

Green v. Menominee Tribe of Indians, 233 U.S. 558 (1914); act of May 29, 1908, 35 Stat. 444.

United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498 (1913); act of February 15, 1909, 35 Stat. 619.

Eastern Cherokees v. United States, 225 U.S. 572 (1912); act of July 1, 1902, 32 Stat. 716, as amplified by act of March 3, 1903, 32 Stat. 982.

Cherokee Nation and United States v. Whitmere, 223 U.S. 108 (1912); act of October 1, 1890, 26 Stat. 1249.

Hussey v. United States, 222 U.S. 88 (1911); act of February 25, 1905, 33 Stat. 815.

Sac & Fox Indians in Iowa v. Sac & Fox Indians of Oklahoma and the United States, 220 U.S. 481 (1911); act of March 1, 1907, 34 Stat. 1055.

Muskrat v. United States, 219 U.S. 346 (1911) act of March 1, 1907, 34 Stat. 1015 & 1028.

Blacklock v. United States, 208 U.S. 75 (1908); act of May 27, 1902, 32 Stat. 207.

United States v. Cherokee Nation, 202 U.S. 101 (1906); act of July 1, 1902, 32 Stat. 726.

Pam-to-Pee v. United States, 187 U.S. 371 (1902); act of March 19, 1890, 26 Stat. 24.

United States v. Choctaw Nation, 179 U.S. 494 (1900); act of March 2, 1895, 28 Stat. 876.

United States v. New York Indians, 173 U.S. 464; act of January 28, 1893, 27 Stat. 426.

New York Indians v. United States, 170 U.S. 1 (1898); act of January 28, 1893, 27 Stat. 426.

United States v. Old Settlers, 147 U.S. 342 (1893); act of January 25, 1889, 25 Stat. 694.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5001, -5002

HERMAN GREY, PAULINE GRAY, RAYMOND JUAN,
GEORGENE MORGAN SEOTA, and
MARY JOSEPH MANUEL,
Plaintiffs-Appellants

v.

THE UNITED STATES,
Defendant-Appellee.

CARLTON G. ABEL and
1,218 other named plaintiffs,
Plaintiffs-Appellants

v.

THE UNITED STATES,
Defendant-Appellee.

DECIDED: May 24, 1991

Before MAYER, *Circuit Judge*, SMITH, *Senior Circuit Judge*, and CLEVENGER, *Circuit Judge*.

CLEVENGER, *Circuit Judge.*

Native American allottees of land located on the Salt River Reservation (collectively referred to herein as "appellants") bring this consolidated appeal challenging a Claims Court judgment that it lacked Tucker Act jurisdiction in *Grey v. United States*, 21 Cl.Ct. 285 (1990), and a judgment dismissing a subsequent complaint (*"Abel"*) on the basis that its decision in *Grey* governed that action.

Appellants bore the burden of establishing Tucker Act jurisdiction in the Claims Court by demonstrating a substantive right enforceable against the United States for money damages. The Claims Court meticulously considered every fact and issue raised here by appellants, and rendered a thorough and comprehensive opinion in deciding the case. We *affirm* on the basis of that opinion.

IN THE UNITED STATES CLAIMS COURT

No. 588-84L

(FILED: August 9, 1990)

HERMAN GREY, PAULINE GREY, RAYMOND JUAN, GEORGENE MORGAN SEOTA, and MARY JOSEPHINE MAÑUEL,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Jurisdiction, Indian Water Rigrts; Trust Responsibility; Tribal Rights Versus Individual Indian Allottee Rights; *Winters* Right Doctrine

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Philip J. Shea, Phoenix, Arizona, for plaintiffs.

R. Anthony Rogers, Washington, D.C., for defendant.

OPINION

TIDWELL, Judge:

This action addresses the delivery of irrigation water resources to Native American Allottees residing on the Salt River Indian Reservation. Water resources of the

Salt River Valley are controlled by the Salt River Project whose six reservoirs store water from the Salt and Verde Rivers. The stored water is then delivered to the reservation and to more than 1.5 million people living in the Phoenix Metropolitan area.

Plaintiffs are holders of fractional to full interests in various allotments of lands on the Salt River Pima-Maricopa Indian Reservation. They claim damages resulting from the failure of United States government officials "to administer their responsibility to control lawful delivery of irrigation water from the Salt River to the allotted lands of the Indian Reservation." Plaintiffs assert that the government had a duty to deliver water to their allotted lands which duty was breached.

The parties presented evidence on two key issues at trial. First, whether this court has jurisdiction over plaintiffs' claims by virtue of a statute or regulation which can be fairly interpreted as mandating compensation by the federal government for failure to deliver surface water to allotted Indian lands. And, if so, whether the failure to deliver water in accordance with *Winters v. United States*, 207 U.S. 564 (1908)[1] from water stored in the Salt River Reclamation Project area to individual allottees constituted an actionable breach.

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[1] *Winters*, a judicially derived "law," held that the withdrawal of federal land from the public domain for a federal purpose reserved, by implication, appurtenant water, then unappropriated, to the extent necessary to accomplish the purpose that the land was set aside. This means of appropriating water became known as the Winters Doctrine or Winters Right. The Winters Doctrine has been applied to all lands set aside as indian reservations. The principle was reaffirmed in *Arizona v. California*, 373 U.S. 546, 595-61 (1963), and later in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 86 (1979). In *Winters* the Supreme Court recognized reserved rights in an Indian tribe apparently because of unceded aboriginal sovereignty over that water, *i.e.*, a tribe's rights to sufficient water to support a homeland on the reservation.

Plaintiffs claim entitlement to damages resulting from having to pay higher prices for water deliveries to their lands than others paid for water deliveries to non-reservation lands. After reviewing the evidence presented at trial, and for the reasons that follow, the court finds that plaintiffs are not entitled to recover.

FACTS

The Salt River valley is part of the arid desert surrounding Phoenix, Arizona. The hot, dry desert climate is incapable of sustaining substantial vegetation without irrigation. The amount of rainfall varies widely. In dry years the flow of the Salt River diminishes sharply, yet rainfall can occur for short intense periods and produce a substantial run-off resulting in flooding along the river. Without regulation of the stream flow floods cause injury to landowners. Flood water is lost instead of being stored for delivery during draught periods.

The Pima and Maricopa tribes have a long history[2] of diverting water from the Salt River to irrigate their lands and grow crops. *Arizona v. California*, 373 U.S. 546, 552 (1963). In fact, Father Eusebio Kino found ancestors of the Pima Indians practicing fairly sophisticated irrigation agriculture in the nearby Gila River Valley during his visits to the area in the 1690's.[3] The Indians used rock and brush dams to divert water from rivers to canals and onto arid lands to irrigate corn, beans, squash, and melons. By the time Arizona became a territory under the sovereignty of the United States in 1863 the Pima and Maricopa Indians were a self suf-

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[2] The history recounted in the facts of this case is necessarily brief. Much of the history presented applies not only to the Pima-Maricopa reservation, but to the nearby Gila River reservation as well.

[3] *Kino's Memoir of Pimeria Acts* (2d ed. 1948), Father Kino's history is the first written account by Spanish explorers visiting the Salt River area.

ficient, pastoral people. United States government officials reported that the Indians had developed an agricultural society with entrepreneurial skills that relied on irrigation of tribal lands to produce crops for consumption and sale.

Later immigrants and settlers established farms and displaced the Indians. As early as 1870 farming operations of the Pima and Maricopa Indians along the Gila River were disrupted by upstream diversions of water by white farmers and miners. In 1878, Captain Adana A. Chaffee, of the United States Army, reported that settlers south of the Salt River were attempting to take lands of the Pima Indians who lived and farmed by the river. Chaffee described the actions of the settlers as "nothing more or less than a legal steal of about a thousand acres of improved land, or rather, the improvements put upon the lands by the Indians . . ." Letter from Captain Adana Chaffee to the Assistant Adjutant General, Headquarters, Department of Arizona, Prescott Barracks (Nov. 24, 1878). During this same time period the Indians were charged with trespass because some of their animals grazed on lands white farmers had "settled." A month later General Erwin McDowell reacted to Captain Chaffee's report:

> There is no question in my mind as to the duty of the United States Government toward these Indians, who did more to give peace and security to Arizona than all the white troops combined, and who are not nomads but farmers and intelligent people, fully susceptible of being civilized. The United States should at once take measures, by injunction or otherwise, to restore to these Indians the rights to water to which they are entitled.
>
> But as it will take time to do this and as the present exigency does not admit of delay I ask that an additional reservation be at once declared for them, . . .

Letter from General Erwin McDowell to Headquarters Military Division of the Pacific and Department of California (Dec. 23, 1878). In response, by Executive Order, and not by treaty, President Rutherford B. Hays established a reservation of approximately 51,000-acres. Executive Order, June 14, 1879. The reservation has a southern boundary along the middle of the Salt River. The Indians relocated from the Gila River Valley to the reservation located south and west of the confluence of the Salt and Verde Rivers. The reservation is now adjacent to the Phoenix Metropolitan area and its borders abut the cities of Scottsdale, Mesa, and Tempe, Arizona.

From the creation of the reservation in 1879 the Indians diverted Salt River water for irrigation of lands on the north side of the Salt River by building more brush and rock dams. The Indian system for water diversion was rendered ineffective by the construction of Granite Reef Dam and Arizona Canal in 1884. The Arizona Canal runs essentially from east to west through the Salt River Indian Reservation, continues for a total distance of forty miles across the Salt River Valley, and constitutes the northern limit of the lands irrigated by the river water. In July 1884 a lateral from the Arizona canal, called the Indian Ditch, was constructed to provide a source of water for Indian lands.

In 1902 the Secretary of the Interior was authorized to withdraw Salt River Valley lands for construction of the Salt River Federal Reclamation Project. In 1903 a water user's association was formed which did not include the Indian reservation in the Project area and in 1904, the Secretary entered into a contract with the user's association for repayment of Project costs. The contract provided that only members of the user's association could receive water from the Salt River Project.

In 1905 a lawsuit was filed in Arizona territorial court to clarify water rights in the Salt River Project area.

The federal government filed claims on behalf of the Salt River Association asserting the Indians' prior appropriation rights under state law. These claims were not amended by the Justice Department following the landmark decision in *Winters*, 207 U.S. 564 (1908), because of its position that *Winters* applied only to reservations created by treaty, not executive order.

In 1910 the Arizona territorial court issued what became known as the Kent Decree that defined water rights in the Salt River Project area.[4] Records of Frank P. Trott the court-appointed water commissioner revealed that the Indians received 500 miners' inches[5] of water annually from 1895 to 1910. Judge Kent gave the Indians additional water by increasing the flow of water to the Indians from 500 to 700 miner's inches but reduced the amount of reservation land entitled to irrigation. The Kent Decree limited the claims of Indian farmers to natural flows with no rights to the use of stored water during periods of draught.

The Salt River Project first became operational in 1911. The original infrastructure on the Salt River Project included the Roosevelt Dam, the Granite Reef Diversion Dam and the Diversion Canals. These facilities were purchased or constructed by the United States between 1905 and 1913. In later years the water storage capacity of the Salt River Project was enhanced by the construction of five additional dams and by ground water

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[4] *Hurley v. Abbott*, Third District Arizona Territory No. 4564, filed March 1, 1910 (Defendant's Exhibit No. 169).

[5] Miners' inches is a term that describes the quantity in a flow of water. Experts testified at trial that the definition of a miners' inch of water varies from state to state. In Arizona 40 miners' inches is equal to one cubic foot per second flowing continuously for one year. Water is now measured in acre feet. An acre foot is enough water necessary to cover an acre to the depth of one foot. In ordinary terms an acre foot of water is 43,560 cubic feet. A cubic foot contains 7.4805 gallons of water therefore, an acre foot of water is 325,850 gallons.

pumping from wells. Mormon Flat Dam on the Salt River, with a capacity of 57,000 acre feet, was completed in 1925. Horse Mesa Dam was added in 1927 with a capacity of 245,000 acre feet and in 1930 Stewart Mountain Dam the last dam constructed on the Salt River, was added with a capacity of 69,000 acre feet. Bartlett Dam in 1939 and the Horseshoe Dam in 1946 added 318,238 acre-feet of storage capacity on the Verde River to the Salt River Project water system.

The Salt River Project controls a finite resource of approximately 2,168,258 acre-feet of stored water. In wet years additional overflow or spill water is available when the reservoirs have reached full capacity. Pumped ground water also augments the storage capacity of the Salt River reservoir system. The maximum groundwater delivery capacity is 738,595 acre-feet per year from wells in the Salt River Valley. From the combination of reservoir and pumped water, the Salt River Project delivers approximately 1.2 million acre-feet of water per year to water users in the Salt River Valley.

In 1913 the Secretary asked the water users association to determine the size of the Salt River Project because it was projected that there would not be sufficient water to irrigate all member lands. During that same year the local Bureau of Indian Affairs (BIA) agent enrolled some Salt River Indian lands that had been allocated water rights under the Kent Decree for membership in the water users association. Later, when it became apparent that allotted reservation lands were entitled to water without participating as paying members of the Salt River Project, the BIA withdrew the request to admit reservation lands to the water users association.

In an appropriation act for the Bureau of Indian Affairs, Act of May 18, 1916, ch. 125 39 Stat. 130 (1916), Congress directed the Secretary to provide water for 6,310 acres of newly allotted Indian lands but did not state how much water was to be delivered or from what

source. The Secretary and the Salt River Project asserted that there was no Project water available to irrigate the 6,310 acres. Public notice was issued in 1917 on the official opening of the Salt River Project and on September 6, 1917 the Secretary officially released operation and maintenance responsibility for the Salt River Project to the water users' association. Three other public notices announced the addition of new divisions to the Project but despite the addition of other water users in the new divisions no additional Indian lands were included in the area served by the Salt River Project.

From 1917 to 1935 BIA attempted to obtain alternate water sources for the 6,310 acres of Indian allotment. During the same time period, the water users' association built the three smaller dams, *i.e.*, Horse Mesa Dam, Mormon Flats Dam, and Stewart Mountain Dam, all located below Roosevelt Dam. Meanwhile, the Secretary approved the pumping of water from wells on Project lands and the concrete lining of canals to prevent seepage losses. By 1935 the Secretary, in consultation with the Salt River Project, decided to build the Bartlett Dam on the Verde River. Construction of that dam provided additional water for use on the Indian Reservation and in the Salt River Project. The Bartlett Dam Agreement provided 20,000-acre feet of water annually for use on the 6,310 acres of allotted lands on the Indian reservation but subsequent attempts by the tribe to have the United States reopen the Kent Decree to secure water rights under the *Winters* doctrine were unsuccessful.

Horseshoe Dam was completed in 1946 under an agreement between the Salt River Project and Phelps Dodge Corporation. Subsequently, the Secretary approved a contract between the Salt River Project and the federal government which provided a complex method for calculation of the storage rights of water impounded by Bartlett Dam after completion of the Horseshoe Dam. The Indians soon discovered that the agreed upon accounting

system ultimately worked to the tribes' disadvantage. The accounting formula resulted in a reduction in tribal rights to stored water credits as the reservoirs behind the dams filled to their capacities. The tribe did, however, receive 20,000 additional acre feet of water for 631 allotments as a result of the Bartlett Dam Agreement. All of the Indian allotments—804 receiving water under the Kent Decree and 631 receiving water under the Bartlett Dam Agreement—are located south of the Arizona Canal.

During the 1950's the Salt River Project executed agreements with the cities of Phoenix, Scottsdale and Tempe as Project lands changed from agricultural to urban use. The Project committed to deliver ever increasing amounts of water to the urban purchasers.

In 1952 Congress passed the McCarran Amendment that authorized the adjudication of federal water rights in state court proceedings pursuant to state law. The McCarran Amendment, Pub. L. No. 495, 66 Stat. 560 (1952), 43 U.S.C. § 666 (1982), waived the sovereign immunity of the United States, and provided for state courts jurisdiction to adjudicate Indian water rights. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 548-53 (1983); *Colorado River Water Conservation Dist v. United States*, 424 U.S. 800, 802-13 (1976). Thus, the quantity of water available to the Indian is determined by the Arizona state court.

In 1951, the Salt River Pima-Maricopa Indian Community, in its own right, on behalf of the constituent tribes, and on behalf of its individual members, sued the United States before the Indian Claims Commission. The suit claimed, among other things, that the United States in its role as guardian had mismanaged the Indian's water and water rights. On December 15, 1976 the case was transferred from the Indian Claims Commission to the United States Court of Claims, becoming Docket No.

291. Later, in 1978 the President of the United States signed an act that adjusted the southern boundary of the Salt River Pima-Maricopa Indian Reservation. Pub. L. No. 95-399, 92 Stat. 851 (1978). The Act also satisfied the property accounting claims asserted by plaintiffs and caused the claims to be abandoned. In January, 1979 plaintiffs filed an amended petition and stated that the only remaining claim was an accounting for deprivation of water rights. On July 2, 1982 the Court of Claims entered an order granting judgment for plaintiffs in the amount of $13 million dollars. The settlement agreement as signed by the parties provided:

> 2. All claims for money damages for failure to deliver water to the plaintiffs' tribal lands from 1879 to the date of entry of final judgment herein based on the claims asserted by plaintiffs in their pleadings, or which they could have asserted for money damages in their pleadings, are hereby extinguished.

Stipulation for Entry of Judgment, filed June 16, 1982, at 1.

Today, the allotment lands of the Salt River reservation present a mosaic with all levels of cultivation in view. Some allotments are under cultivation with crops being harvested each year, others lie fallow and many are not utilized to the fullest extent. At trial several reasons were given for lands remaining idle. Some allotments were taken out of production because they were too close to the city of Scottsdale and the Community College to allow aerial spraying. Consequenty, high-value crops such as cotton could not be grown. Other allotments participated in federal set-aside programs whereby owners are paid by the government not to farm. Still other allotments remained idle because the allottees could not agree to lease the lands for farming. Finally, many of the allotments have substandard or non-existent facilities to distribute irrigation water received.

Two decades of litigation and negotiation failed to produce a settlement of the tribe's water rights which led to passage by the Congress of the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act. Pub. L. No. 100-512, 102 Stat. 2549 (1988) (Settlement Act). The statute provided that the Indian community is entitled to 122,400 acre-feet of water per year from both surface water of the Salt River Project and ground water pumped on the reservation. The Settlement Act instructed the Secretary to construct new diversion and delivery facilities to make river water available to lands north of the Arizona canal that are at a higher elevation than the lands south. Until the new facilities are constructed lands north of the canal can obviously only use pumped ground water. The Act also established a fund to provide money to rehabilitate the existing irrigation system and construct additional facilities on the reservation. The government contributed $47.4 million to the community fund for design, rehabilitation and construction of new facilities to put the Indians' existing water, as well as additional water to beneficial use.[6] Paragraph 4 of the Settlement Act describes the irrigation needs to permit crop cultivation. According to the Act crops can be successfully cultivated with 4.5 acre feet of water per acre instead of 5.4 acre feet per acre previously regarded as normal in the Salt River Valley. The Settlement Act also extinguished claims for water by the Indian community and individual allotment owners and mitigated any prejudice incurred by Indians who refrained from litigation during several years of efforts concentrated on settlement negotiations.

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[6] The water made available to the tribes will not be used exclusively for irrigation on the reservation. The Settlement Act also provides that the tribes will lease 13,300 acre feet of water per year to the city of Phoenix. The lease provides that the Indian community will supply water for the term from January 1, 2000 to December 30, 2098 in return for $16,000,000. Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. No. 100-512. 102 Stat. 2554 § 8(a) (1988).

DISCUSSION

I. *Jurisdiction*

Plaintiffs seek relief based on the theory that defendant breached an obligation to them founded on statutory duty. The Tucker Act confers jurisdiction on this court to "render judgment upon any claim against the United States founded either upon the Constituton, or any Act of Congress or any regulation . . . ." 28 U.S.C. § 1491 (a)(1) (1982). Because this claim is brought by individual Indians and not the tribe, § 1491 defines this court's jurisdiction.[7]

Plaintiffs contend that sections of the General Allotment Act, dealing with irrigated agricultural allotments, 25 U.S.C. §§ 331, 338 (1988); and the regulations governing irrigation of Indian lands, 25 C.F.R. 171 (1989); in combination with "reclamation laws" give rise to the existence of an obligation akin to a special trust relationship between the United States and Indian Allottees under which their claim is actionable. Defendant does not agree that this court has jurisdiction over plaintiffs' claims because there is no statute or regulation which can be fairly interpreted as mandating compensation. The United States Claims Court may exercise its Tucker Act jurisdiction only where there is an independent source of substantive law which can be fairly interpreted as mandating compensation for money damages sustained. *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (*Mitchell II*); and *United States v. Testan*, 424 U.S. 392, 400 (1976). This court's predecessor, the United States Court of Claims, also held that the Tucker Act granted jurisdiction only when an independent substantive right for money damages existed. *Eastport Steamship Corp. v.*

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[7] Indian claims referred to in 28 U.S.C. § 1505 (1982), are not applicable to actions brought by individual Indians. *See Fields v. United States*, 191 Ct. Cl. 191, 423 F.2d 380 (1970).

United States, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967).

1. *United States v. Mitchell*

In *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); and *Mitchell II*, 463 U.S. 206, the Supreme Court set forth the standard used to determine whether this court has jurisdiction to hear a claim for breach of statutory duty. In *Mitchell I*, the Supreme Court reversed the United States Court of Claims and held that the General Allotment Act, 25 U.S.C. § 331 (1988), was not sufficient basis for a claim that the government breached any fiduciary duty owed to the Indians. The Court determined that the General Allotment Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources. *Mitchell I*, 445 U.S. at 542. The case was remanded to the Court of Claims for a determination if any other statute provided the plaintiffs with substantive rights. On remand, the Court of Claims found that other statutes and regulations could sustain a "trust" relationship between the government and the Indians. Specifically, the timber management statutes, accompanying regulations, and right-of-way provisions created a substantive right enforceable by money damages. *Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265 (1981).

In *Mitchell II*, the Supreme Court upheld the Claims Court decision and found that the combination of statutes and regulations evinced congressional intent to create a "trust" relationship between the United States and recognized Indian tribes.[8] The court concluded that the Secre-

[8] The existence of a trust relationship does not mean that any and every claim by the Indians "necessarily states a proper claim for breach of trust." *Pawnee v. United States*, 830 F.2d 187, 191 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The mere allegation of a breach of trust is not sufficient to state a claim within this court's jurisdiction. The general relationship between the United

tary controlled virtually every stage of the timber sale process and that the timber management statutes "establish the comprehensive responsibilities of the Federal Government" to exercise " 'literally daily supervision over the harvesting and management of tribal timber.' " *Mitchell II*, 463 U.S. 22 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 147 (1980)). By undertaking that responsibility, the United States also undertook a duty to handle it properly as measured generally against a very high standard.

This court must now examine the legislative and regulatory schemes, as presented by the plaintiffs, to determine if there are sufficient "pervasive" or "comprehensive" controls to create a fiduciary relationship.

2. *Pre-1988 Statutes and Regulations*

An examination of the pre-1988 statutes and regulations cited by plaintiffs fails in our opinion to establish the trust relationship contemplated by *Mitchell II*. Section 331 is part of the General Allotment Act of 1887. It provides for the allotment of irrigable and grazing lands for Indians living on reservations. 25 U.S.C. § 331. Section 338, repealed in 1928, required the Secretary to submit a cost accounting to Congress of survey and allot-

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States and the Indians is not comparable to a private trust-type relationship. *Eastern Band of Cherokee Indians v. United States*, 16 Cl. Ct. 75, 78 (1988). Rather, the relationship has traditionally been understood as one of guardian-ward. *Mitchell II*, 463 U.S. at 234 (Powell, J., Dissenting); *Klamath Indians v. United States*, 296 U.S. 244, 254 (1935). The nature of the guardian-ward relationship implies that at some point in time, the ward will assume responsibility for handling its own affairs. In contrast, a private trust relationship is static with all encompassing duties on the trustee. Over the years Congress has enacted numerous statutes benefitting the Indians, some statutes are fairly characterized as placing trust responsibilities on the government. Other statutes are guardian in nature because they contemplate active participation by the Indians in the decision-making process.

ment work performed. These general allotment sections are the same type that were rejected by *Mitchell I* as insufficient to create a trust relationship. Nothing in §§ 331 or 338 suggest that Congress intended to divide ad convey tribal water rights to individual allottees as it did with tribal lands. The General Allotment Act was held to create only a limited or bare trust relationship that did not impose any duty on the government to manage resources on allotted lands. *Mitchell I*, 445 U.S. at 543. More specifically, the General Allotment Act does not impose any duty on the Government to manage the water on each individual allotment.

The regulations governing irrigation of Indian lands are directed at the operation and maintenance of the water delivery system. 25 C.F.R. part 171 (1989). Under the regulatory scheme the government sets rates paid for water; assesses and collects fees for maintenance; and delivers water to the boundary of individual farm units. 25 C.F.R. § 171. Allottees determine how to irrigate their respective farms and are responsible for the distribution of water on their individual allotment.

This case differs from *Mitchell II* both as to the resource in question, and how it was managed. The difference is critical when examined in light of the trust corpus requirement. In *Mitchell II*, the Court found a general fiduciary obligation with respect to the management of timber resources on alloted lands. Timber assets on reservations resemble a trust corpus because they must be managed in such a way as to conserve the asset while maximizing income by allowing mature timber to be harvested and sold. The government must assume the duty of preserving the principal (timber), generating income (timber sales), and disbursing profits to individual allotment holders. The statutory scheme in *Mitchell II*, was so pervasive that even individual Indians were precluded from conducting logging operations on their own allotment.

The government did not assume, nor does the law provide for similar responsibilities in this case. No evidence has been presented that the government failed to deliver the water the Indians were entitled to under the Kent Decree and the Bartlett Dam Agreement. Plaintiff did present evidence that water was priced differently than water available to members of the Salt River Project.[9] The government fulfilled its duty by delivering the tribe's reserved water right to the delivery points designated by individual allotees. Agents of the government are required to "establish the method of and procedures for the delivery of the available irrigation water —[and] endeavor to apportion the water . . . on a fair and equitable basis between all . . . water users entitled to the receipt of irrigation water." 25 C.F.R. § 171.6(a). Presumably, the tribe exercised its sovereignty in determining which allotments were entitled to a portion of the finite amount of water available.[10] The allottees then

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[9] Prices for irrigation water on the Pima-Maricopa are set in accordance with 25 C.F.R. § 171.1 (1989). The prices are independent from prices charged by the Salt River Project. Rates charged plaintiff are published from time to time in the Federal Register. The rate charged includes an assessment for "normal operation and maintenance" of the water delivery ssytems found on the reservation. 25 C.F.R. § 171.1(f).

Similarly, Salt River Water Users Association prices its water to include maintenance and operation costs. The price paid by non-Indians is subsidized by revenues from generating electricity at the various dams in the Salt River Project. The Salt River Project delivers Kent Decree and Bartlett Dam Agreement water to the Salt River Indian Reservation free of charge.

[10] Prior to 1915, 24,120 acres of the reservation had been allotted into 804 thirty-acre allotments. Each allotment consisted of ten acres of irrigable and twenty acres of non-irrigable (grazing) land. Water for the 8,040 acres of irrigable land was provided by the Kent Decree. Later, in 1917, 631 allotments of ten acres each were designated by the Secretary of the Interior. Water for use on the 631 allotments was provided by the Bartlett Dam Agreement in 1935. The twenty-acre grazing allotments were not entitled to water for irrigation.

Regulation of the use and disposition of private property within the reservation is provided for by the Constitution and by-laws of

exercised discretion in determining when they wanted water and how much water would be used to irrigate their allotments. Also, individual Indians could lease their ground and corresponding water to non-Indian commercial farmers.

There are other distinct differences between *Mitchell II* and this case. *Mitchell II* determined that allottees could recover for economic damage incurred in the management of their timber allotments. Plaintiffs farm allotments in this case were not directly managed by the defendant. Plaintiffs were free to farm their own allotment, let the ground lie fallow for any number of valid, intentional reasons, or lease it to others. Proximity to nearby residential communities and government subsidy to Indians who withheld allotments from agricultural production are other reasons why the defendant lacked the control and responsibility that was so pervasive in *Mitchell II*. In *Mitchell II* only the government could contract for the cutting of timber on Indian lands. The use of water on plaintiffs' land in this case was not subject to the extensive "daily supervision" and control required by the court in *Mitchell II*. The government's role in irrigation

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the Salt River Pima-Maricopa Indian Community. The rights of the community council include the power:

> Generally, to provide for the proper use and development and prevent the misuse of the lands, natural resources, and other public property of the Salt River Pima-Maricopa Indian Community;

Constitution and By-Laws of the Salt River Pima-Maricopa Indian Community Art. III § 5(d) (Pl. Ex. 52). Although all allottees with ten-acre irrigable allotments are entitled to an equal share of water, the tribe assumed responsibility to prevent the misuse of water by preventing the sale, lease or disposition of land without the consent of the Indian community. The exercise of this power by the tribe is consistent with exercise of this power by the tribe is consistent with the notion that Indian allotments are held in trust for the benefit of the allottee. Water acquired by virtue of the *Winters* right, however, is held for the benefit of the entire tribe and must, therefore, be allocated equally among all holders of irrigable allotments.

of plaintiffs' lands is not pervasive nor are its responsibilities comprehensive. The statutes and regulations set forth the government's responsibility to provide water to tribal lands. The statutes and regulations cited by plaintiffs do not contain an explicit and detailed enumeration of duties sufficient permit this court to impose a "trust" relationship contemplated in *Mitchell II*. Congress simply did not intend or imply that defendant act as a trustee with responsibility for irrigating each individual allotment.[11]

3. *Reclamation Laws*

The primary purpose of the Reclamation Act of 1902 was to provide for construction and operation of water storage and timed release Projects on federal lands under the control of the Secretary. The Supreme Court has held that "the [Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water." *California v. United States*, 438 U.S. 645, 664 (1978). The Supreme Court has also held that the government acts simply as a carrier and

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[11] This court is aware of other statutes regarding the irrigation of allotted Indian lands not cited by the parties. 25 U.S.C. §§ 381-390. These statutes are consistent with the analysis presented in this opinion. Section 382 provides that "no lien or charge for construction, operation or maintenance" of reclamation projects shall be created against Indian lands. Thus, plaintiffs receive water from the Salt River Project under the Kent Decree and Bartlett Dam Agreement without incurring costs for maintenance of the project's storage and delivery systems. Plaintiffs were responsible, however, for a portion of the cost to deliver water within the Indian reservation. 25 C.F.R. § 171.1(f). Section 386 provides that the Secretary may require owners of irrigated allotments to begin partial reimbursement for construction charges arising from irrigation systems constructed on the reservation for the benefit of the Indians. These two sections (§ 382 and § 386) may provide a partial explanation of the cost differential for water delivered to allotments on the reservation. Because the parties presented no evidence on the pricing of water, the court makes no finding as to the effect of these statutes or regulations regarding the differing prices of water.

distributor of water. *Ickes v. Fox*, 300 U.S. 82, 95 (1937). After reaffirming the foregoing principle, that the government acts as a distributor of water, the Supreme Court stated that "[T]he property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals." *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945).

Finally, the Supreme Court found that Congress has required:

> . . . the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. . . . The Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.

Nevada v. United States, 463 U.S. 110, 128 (1983). The parties presented extensive evidence on the government's participation in the creation of the Salt River Valley Water Users' Association. None of the evidence presented contemplated that the Interior Department would have complete control over water distribution. Section 4 of the Reclamation Act authorizes the Secretary to contract for the construction of an irrigation Project but also states, at section 8:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in con-

> formity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383 (1982). Congress did not intend to give the Secreatry total control of the water in the Salt River or any other reclamation Project. The Secretary's duty to store water and construct irrigation facilities is limited by the rights of others to the use of the water. The reclamation laws did not vest in the United States ownership of any water rights except for those properly appropriated and put to beneficial use under the *Winters* Doctrine. Moreover, it must be borne in mind that under the *Winters* Doctrine the federal government acting on its own behalf, or for a tribe, does not have a totally unfettered right to appropriate water, especially to the detriment of prior perfected water rights after the individual withdrawal and appropriation of previously unappropriated water. To the extent that all of the water in any river or basin is now fully appropriated, which is oftentimes the case, and additional water is sought over and above, and/or for a different purpose, than the water initially appropriated, the United States in accordance with *Winters* must stand in line with other aspiring water users before the appropriate state or compact water allocation board. Thus, the reclamation laws do not provide a basis for plaintiffs' claim that the United States has created a comprehensive scheme and assumed elaborate control over the exploration of water resources. The reclamation laws are not sufficiently pervasive to create the fiduciary relationship defined by the court in *Mitchell II*.

4. *Salt River Water Rights Settlement Act*

The 1988 Settlement Act confirmed a comprehensive settlement agreement between the Salt River Indian Community and the state of Arizona, the Salt River Federal

Reclamation Project, large water districts, as well as all of the cities in the Salt River Valley. Plaintiffs argue that the Settlement Act provides jurisdiction for this court to resolve the allottee's claims for damage now pending in the current cause of action. The language of the Settlement Act provides otherwise. In section 2, Congress made specific findings and declared that "the policy of the United States, in fulfillment of its trust responsibility to Indian tribes, . . . [is] to settle, wherever possible, the water rights claims of Indian tribes without lengthy and costly litigation. . . ." Congress further found that the United States "obtained water entitlements . . . pursuant to the Kent Decree of 1910, . . . the Bartlett Dam Agreement of 1935" and "has filed claims for the community's water rights in the . . . Superior Court of the State of Arizona." The Settlement Act then authorized the actions and made appropriations necessary for the United States to perform its obligations to the community as provided by the statute. No part of the Settlement Act refers to any form of relationship between the United States and *individual allottees.* The Act defined the government's duty to the Indian *tribes* that constitute the Salt River Pima-Maricopa Indian Community.

The Settlement Agreement and the Settlement Act resolved the Salt River Indian water rights litigation in several cases pending in the United States District Court of Arizona. The statute then stated a procedure to resolve any remaining claims of individual allottees and the Indian community. The Agreement and Act, however, have no impact on the case currently before this court. Individual Indian allottees were not parties to the settlement agreement. Since the individual allottees did not give releases as part of the settlement, the non-Indian users of Salt River water resources feared subsequent litigation. To avoid future lawsuits by individual allottees, and to put an end to perpetual litigations, the Settlement Act extinguished prospective claims of Indian allotment owners. In § 10 of the Act Congress expressly provided for

resolution of allottees claims, arising after the 1991 implementation date, in the United States Claims Court. The Act thus protected the parties to the Settlement Agreement and individual allottees from future litigation for deprivation of water rights.

Individual allottees with existing claims or grievances do have the opportunity to bring an action in this court when their claims are based on a substantive right found in "the Constitution . . . any act of Congress, or any regulation . . ." 28 U.S.C. § 1491; *Mitchell II*, 463 U.S. at 216. The Settlement Act at issue here provides relief for claims arising out of the Settlement Agreement. Section 10(a)(1) of the Act distinguished these claims as "claims . . . for deprivation of water rights through December 31, 1991 . . ." 102 Stat. 2549, 2256 (1988). Thus, the Act recognized claims that could arise as a result of the Settlement Agreement. The Settlement Act provided no enforceable substantive right that would support plaintiffs' claims for failure to deliver water in the past. Simply stated, the Settlement Act provided jurisdiction for this court to hear claims extinguished by the Act but, based on a substantive right found elsewhere in the statutes or regulations. The Act does not in and of itself provide a jurisdictional basis for claims arising prior to 1991 that have no other statute mandating compensation.

The legislative history of the Act indicates congressional intent to mandate compensation to allottees for future money damages sustained. When introduced in the House of Representatives, the Bill (H.R. 4102) provided:

> SEC. 10. CLAIMS EXTINGUISHMENT: PAYMENTS; WAIVERS AND RELEASES.
>
> (a)(1) There are hereby extinguished:
>
> (A) all claims of Allottees which are, or which may have been, asserted in Herman Grey and others versus United States, Docket Numbered

588-84L, in the United States Court of Claims; [this very case]

(B) (i) all claims of water rights or injuries to water rights (including water rights in ground water, surface water, and effluent), from time immemorial to the effective date of this Act; and

(ii) any and all future claims of water rights (including water rights in ground water, surface water, and effluent), from and after the effective date of this Act, which such Allottees may have against the United States; the State of Arizona, and any agency or political subdivision thereof; or any other person, corporation, or municipal corporation, arising under the laws of the United tSates or the State of Arizona.

(2) The Allottees, individually or as a class, shall be entitled to maintain an action against the United States in the United States Court of Claims pursuant to section 1491 of title 28, United States Code, to recover damages, if any, for the extinguishment of the claims effected by this subsection.

H.R. 4102, 100th Cong., 2d Sess. § 10(a) (1988). Thus, the original version of the proposed statute contained a reference to this case in § 10(a)(1)(A). After the Bill was reported from the House Committee on Interior and Insular Affairs, but before enacted by the full House of Representatives, it was amended. As passed and signed by the President, § 10(a) reads:

SEC. 10. CLAIMS EXTINGUISHMENT; WAIVERS AND RELEASES.

(a)(1) There are extinguished—

(A) all Allottees' claims against the United States for damages for deprivation of water rights through December 31, 1991;

(B) all Allottees' claims against all persons other than the United States for damages for deprivation of water rights through December 31, 1991, for which damages are not recoverable under subparagraph (a)(1)(A) of this section; and

(C) all rights of Allottees to assert claims against the United States and all other persons for declaratory, injunctive or other relief for the determination or enforcement of water rights for allotted lands, including rights to surface water, ground water, and effluent.

(2) For purposes of paragraph (a)(1) of this section claims for water rights include all claims under Federal and State laws (including claims for water rights in ground water, surface water, and effluent) which may otherwise have been enforceable by money damages, declaratory relief, injunction, or other relief.

(3) The benefits realized by the Allottees under this Act shall constitute full and complete satisfaction of all Allottees' claims for water rights under Federal and State laws (including claims for water rights in ground water, surface water, and effluent) that may accrue after the authorizations contained in paragraph (b)(1) of this section have become effective and which would otherwise have been enforceable by money damages, declaratory relief, injunction, or other relief.

(4) Consent is given to Allottees to maintain actions, individually or as a class, against the United States in the United States Claims Court pursuant to section 1491 of title 28, United States Code, to recover damages, if any, for the extinguishment of claims effected by subparagraphs (a)(1)(A) and (a)(1)(B) of this section; *Provided, however,* That

> any claim for damages for rights extinguished by subparagraphs (a) (1) (B) of this section shall not be joined in the same action as a claim for damages for rights extinguished by subparagraph (a) (1) (A) of this section.

102 Stat. 2549, 2556-57. As conceived, the Act contemplated "extinguishment" of this case and others like it brought by individual allottees. The law as enacted in final form extinguished all allottees claims against the United States for damages for deprivation of water rights through December 31, 1991. Noticeably absent in the statute is the reference to this case found in earlier drafts. The Act gives consent to the allottees to bring suit against the the United States to recover damages resulting from "deprivation of water rights" claims. The language of § 10 reveals that Congress may have assumed some valid claims were in existence. Section 10 provides a forum for resolution of valid pre-existing claims. The Settlement Act does not, however, create a substantive right for claims having no other jurisdictional basis.[12] In this case plaintiffs have not shown an independent substantive right to money damages. The legislative history is silent as to the reason for excluding this case and others like it.

The current case before this court is not resolved by the statute. By "extinguishing" allottee's claims and providing the Claims Court as a forum for Indian Allottees

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[12] As is evident from the plain language of the statute, the Settlement Act does not create new substantive rights or establish a governmental duty to act as fiduciary in managing water for the tribe or individual allottees, nor does the Act automatically extend this court's jurisdiction to every wrong regarding entitlement or delivery of water. Claims brought by the tribes must be examined under the same analytical framework applied to allottee claims in this case. Absent some other statute providing a jurisdictional basis, it is highly unlikely that this court would find the Settlement Act established a substantive right in the tribe to recover.

to initiate litigation, Congress has expressly recognized a cause of action for claims arising out of the Settlement Act and its implementation. The language of the statute specifically addressed future litigation. Beginning in 1992, as a result of the statute, the Salt River Project will deliver additional water to the Salt River Indian Reservation for use on Indian allotments. The United States has contributed funds for the rehabilitation and expansion of irrigation facilities on the reservation that will enable the Indian community to manage and utilize fully its water entitlement. The transfer of responsibility to the Indian community furthers the established noble policy of reducing the role of the United States as guardian of the tribe's water interests. In sum, the statute provides that money is available immediately to improve the reservation irrigation delivery system, and that a total of 122,400 acre-feet of water per year (including ground water pumped on the reservation) will be available beginning in 1992. In return for these benefits, any claims by the tribes or individual allottees for failure to provide additional water rights are extinguished.[13] Congress has consented and allowed Allottees to pursue valid pre-exsiting claims and claims arising from the Settlement Act by maintaining actions against the United States in this court pursuant to 28 U.S.C. 1491 (1982). Section 10, subparagraph 6(A), limits damages to those incurred no more than six years prior to the commencement of an action. Congress gave no date when the right to bring an action would vest under the statute after implementation of the Settlement Agreement in 1991. Accordingly, if jurisdiction were based on the Act, the

[13] Even if this court assumed jurisdiction based on the Settlement Act and found the government liable, recovery by the tribes would be limited to the period after June, 1982. The tribes have previously settled all claims for failure to deliver water from 1879 to June 16, 1982. Accordingly, any claim by the tribes for failure to acquire or deliver water during the period prior to the 1982 settlement date would constitute a fraudulent claim.

six-year statute of limitations prevents any recovery by an allottee for damage occurring prior to October 20, 1982. At trial counsel for plaintiff agreed that any recovery should be limited to six years based on the statute of limitations.[14] In effect the Act acknowledges that there may have been valid damage claims by allottees that preceded the Act, and that the claims may continue to occur until 1992 when additional water deliveries to the reservation will commence. After water becomes available, § 10(a)(3) provides that the additional water will constitute complete satisfaction of all claims and no new claims will arise after 1992. Indeed, by providing water to the reservation and funding a community trust fund for the construction of additional irrigation delivery systems, the United States has effectively transferred the responsibility for water delivery to the Indian community beginning in 1992.

II. *Allottees And The* Winters *Right*

A second and fundamental reason this court lacks jurisdiction is the nature of the *Winters* right itself. Allotted tribal lands and the corresponding *Winters* right to water are communal in nature. Title resides in the tribe it-

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[14] At trial the following exchange took place:

> THE COURT: You are asking me to say that the United States owes money—
>
> * * * *
>
> MR. SHEA: Yes. That is right. The water will not come until 1891, [sic] and [as] of that date, there will be no more damages cliams by anyone connected with the Salt River Indian reservation.
>
> THE COURT: Right now, you want me to—
>
> MR. SHEA: But, until then, we are asking the Court to restore the Plaintiffs to the economic position that they would be in during the period of the statutes of limitations, if they were not Indians. . . .

Transcript of proceedings, filed May 11, 1989 at 83.

self and is not held by individual Indians. *United States v. Chase*, 245 U.S. 89, 99-100 (1917). Recently the Court reaffirmed this principle and held: "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *United States v. Jim*, 409 U.S. 80, 82 (1972) (quoting *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307 (1902)). Nothing in the General Allotment Act or other statutes governing irrigation of allotments suggests that Congress was partitioning and conveying tribal water rights as it did with tribal lands. Neither the Supreme Court nor the Federal Circuit have presumed a Congressional intent to convey to Indian allottees an appurtenant right to an individual share of their tribe's reserved waters. The Supreme Court has only confirmed that an Indian allottee has the "right to use some portion of tribal waters essential to cultivation. . . ." *United States v. Powers*, 305 U.S. 527, 532 (1939).

The General Allotment Act gave the Secretary power to promulgate regulations to secure a just and equal distribution of irrigation water among Indians on a reservation. The Act provides:

> In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

25 U.S.C. § 381 (1988). Thus, the Secretary's regulatory authority is limited in that he may not authorize or permit one Indian allottee to take water to the detriment of another except to equalize their use of irrigation water. The statute implies that individual Indians with

aloltments should have access to a share of available tribal irrigation. The Act does not create a vested right in Indian allottees to receive water beyond their individual share of tribal water. Congress clearly intended that farm allotments be irrigated. Section 381 provides a means for the Secretary to allocate available irrigation water equitably among allotted reservation lands. The statutes do not provide, however, for an individual hold on a vested property right in a pro rata share of the tribes' reserved right.

Winters rights can exist only in a coherent system if they are held by the government. Conveyance of a *Winters* right with its exemption from state water law doctrines would give individual allottees the power to demand water previously put to beneficial use by prior appropriators. The *Winters* right doctrine must, therefore, be held by the government with title residing in the tribes themselves. Accordingly, when additional water for agriculture is needed over the amount provided by the government the tribes may exercise their sovereign powers and seek additional water. The rights of individual allottees are limited to making a demand for a portion of that tribal water; a matter over which this court has no jurisdiction.

The extent and priority of tribal water rights have been determined by courts other than this one. The Supreme Court in passing judgment upon the McCarran Amendment, that waived sovereign immunity in state water rights adjudications, found that it gave rise to a "unique type of proceeding" whereby Indian water rigths are adjudicated in state courts. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 569 (1983). At the time of trial, the only valid determination of water rights on the Salt River was the Kent Decree of 1910.[15] Accordingly, this

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[15] During the period since trial, there has been a settlement of pending state proceedings governing the extent of respective water rights.

court cannot determine the amount of water that should be available to the Indians for use by allottees.

CONCLUSION

After considering the evidence presented at trial, the statutes and regulations cited by the parties, as well as relevant case law, this court concludes that the standard expressed by the Supreme Court in *Mitchell II* has not been satisfied. The sections of the General Allotment Act are insufficient to create any form of fiduciary relationship. Further, neither the irrigation statutes and regulations, nor the reclamation statutes gave rise to a comprehensive scheme whereby the government would be subjected to the high standards required of a trustee. Finally, the Settlement Act of 1988, though providing jurisdiction for some claims by individual Indian allottees, does not give this court jurisdiction over the matter. Moreover, this court is powerless to provide relief to plaintiffs because of the nature of the *Winters* right. The *Winters* right is held by the tribe for the benefit of all Indians in the community. Accordingly, the tribe, not individual Indian allottees, is the proper party to seek enforcement or extension of the *Winters* right. Individual Indians may seek compensation from the tribe if they have been denied a equal share of the tribe's water.

Plaintiffs failed to establish that their claims lie within the jurisdiction of this court as set forth in *Mitchell II*. Plaintiffs also failed to show that the *Winters* right extended to individual allottees. Accordingly, the Clerk is directed to dismiss plaintiffs' complaint and enter judgment for defendant.

/s/ Moody R. Tidwell
MOODY R. TIDWELL
Judge

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5001, -5002

HERMAN GREY, PAULINE GRAY, RAYMOND JUAN,
GEORGENE MORGAN SEOTA, and
MARY JOSEPH MANUEL,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

CARLTON G. ABEL and
1,218 other named plaintiffs,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

ORDER

Before MAYER, Circuit Judge, SMITH, Senior Circuit Judge, CLEVENGER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on August 2, 1991.

FOR THE COURT,

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: July 26, 1991

cc: PHILIP J. SHEA
EVELYN S. YING

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-5001, -5002

HERMAN GREY, PAULINE GRAY, RAYMOND JUAN,
GEORGENE MORGAN SEOTA, and
MARY JOSEPH MANUEL,
Plaintiffs-Appellants

v.

THE UNITED STATES,
Defendant-Appellee.

CARLTON G. ABEL and
1,218 other named plaintiffs,
Plaintiffs-Appellants

v.

THE UNITED STATES,
Defendant-Appellee.

JUDGMENT

On appeal from the United States Claims Court in Case No(s). 588-84 L

This cause having been considered, it is
ORDERED and ADJUDGED. AFFIRMED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated May 24, 1991

COSTS: Against, Appellant.

Printing	$69.59
Total	$69.59

Issued as a Mandate: August 2, 1991

IN THE UNITED STATES CLAIMS COURT

No. 588-84L

HERMAN GREY, PAULINE GREY, RAYMOND JUAN, GEORGENE MORGAN SEOTA, and MARY JOSEPHINE MANUEL,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT
[11/13/84]

I

The plaintiffs, Herman Grey, Pauline Grey, Raymond Juan, Georgene Morgan Seota, and Mary Josephine Manuel, are owners of allotted lands within the Salt River Pima-Maricopa Indian Reservation which is located in the State of Arizona. This is an action for damages arising from the failure of officials of the United States to administer their responsibility to control lawfully the delivery of irrigation water from the Salt River to the allotted lands of the Salt River Pima-Maricopa Indian Reservation. The jurisdiction of this Court is conferred by the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.

II

The plaintiffs are members of a class of persons who own approximately 21,000 acres of irrigable lands in the Salt River Pima-Maricopa Indian Reservation that have been allotted under the provisions of the General

Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U.S.C. §§ 331-357. This class, comprised of several thousand persons, is so numerous that joinder of all of them is impracticable; this case involves questions of law and fact which are common to the class; the claims of the representative plaintiffs are typical of the claims of the class; and the representative plaintiffs will fairly and adequately protect the interests of the class.

III

The Congress has imposed upon the Secretary of the Interior the authority and duty to administer the Salt River Reclamation Project. The project consists of a system of facilities that control the storage, flow and delivery of the water of the Salt River. The principal acts of Congress which confer upon the Secretary the authority and duty to administer the project are: the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. §§ 391 *et seq.*; the Warren Act of February 21, 1911, ch. 141, 36 Stat. 925; the Reclamation Extension Act of August 13, 1914, ch. 247, 38 Stat. 686; the Act of August 11, 1916, ch. 319, 39 Stat. 506, 43 U.S.C. §§ 621-630; the Omnibus Adjustment Act of May 25, 1926, ch. 383, 44 Stat. 636; and the Reclamation Project Act of August 4, 1939, ch. 418, 53 Stat. 1187, 43 U.S.C. §§ 485-485(k).

IV

The Salt River Reclamation Project stores the water drainage from a 13,000 square mile mountainous region north and east of the Salt River Valley. The Project's storage facilities consist of four dams on the Salt River and two dams on the Verde River which is the Salt River's major tributary. From these storage facilities the Project delivers approximately 1,000,000 acre-feet of water per year to the Salt River Valley. The Project distributes

this water to water consumers throughout the 360 square mile Salt River Valley through its canal distribution system. The Project's control over the delivery of Salt River water in the Salt River Valley is total and exclusive.

V

The Salt River Pima-Maricopa Indian Reservation covers an area of about 50,000 acres in the eastern part of the Salt River Valley. It was reserved from the public lands by the Executive Order of Rutherford B. Hayes dated June 14, 1879. The ancestors of the Pima Indians began their development of an agricultural economy and culture through canal irrigation in the Salt River Valley 2,300 years ago. The efforts of the Pimas and Maricopas to maintain their agricultural economy and culture became jeopardized upon the advent in Central Arizona of white farmers. The Salt River Pima-Maricopa Indian Reservation was created along the Salt River and its irrigable lands were allotted to individual Pimas and Maricopas specifically to enable them to continue their agricultural practices. The reserved lands are arid and have no use or value unless water is delivered to them.

VI

By a series of enactments the Congress has conferred upon the Secretary of the Interior the duty to develop and operate the Salt River Indian Irrigation Project as a separate distribution system within the Salt River Reclamation Project for the purpose of facilitating the delivery of Salt River water to the plaintiffs' allotted lands. By reason of these enactments the Secretary has total control over the delivery of water to the plaintiffs' allotments, and conversely the plaintiff allottees have no control over water deliveries to their allotments. The Congress has made unmistakably clear its intention that Indians allotted landowners received benefits from the Federal Salt River projects that are no less favorable than the benefits received by white owners of project

lands. The principal enactments have been: the Act of May 18, 1916, ch. 125, 39 Stat. 123, appropriated $20,000 for the benefit of the Salt River Reclamation Project as the first installment of project charges for 631 additional ten acre allotments; the Act of March 2, 1917, ch. 146, 39 Stat. 969, appropriated $15,000 for the benefit of the Salt River Reclamation Project to pay project charges for the same allotted lands; the Act of May 25, 1918, ch. 86, 40 Stat. 561, appropriated an additional $15,000 for the benefit of the Salt River Reclamation Project for the same purpose and for the construction of Salt River Indian Project distribution facilities; the Act of June 30, 1919, ch. 4, 41 Stat. 3, appropriated an additional $15,000 for the same purposes; the Act of January 24, 1923, ch. 42, 42 Stat. 1174, appropriated $40,000 to line canals of the Salt River Reclamation Project for the benefit of the plaintiffs' allotted lands; the Act of June 5, 1924, ch. 264, 43 Stat. 390, appropriated $3,500 to the Salt River Reclamation Project for the same purpose; the Act of August 9, 1937, ch. 570, 50 Stat. 564, appropriated $650,000 to be applied toward the cost of a new Salt River Reclamation Project dam and for the improvement of the distribution facilities of the Salt River Indian Irrigation Project; the Act of May 9, 1938, ch. 187, 52 Stat. 291, appropriated an additional $200,000 for the same purposes; and the Act of June 25, 1938, ch. 681, 52 Stat. 1114, appropriated an additional $42,712 for the same purposes. From 1939 through 1945 the Congress appropriated sums for the construction and repair of the Salt River Indian Irrigation Project facilities and for purchase of water rights for the Project, which sums the Secretary allocated between the Salt River Indian Irrigation Project and the Salt River Reclamation Project. These statutes and the appropriated sums are: the Act of May 10, 1939, ch. 119, 53 Stat. 685, $10,000; the Act of June 18, 1940, ch. 395, 54 Stat. 406, $50,000; the Act of June 28, 1941, ch. 259, 55 Stat. 303, $40,000; the Act of July 2, 1942, ch. 473, 56 Stat. 506,

$10,000; the Act of June 28, 1944, ch. 298, 58 Stat. 463, $30,000; and the Act of July 3, 1945, ch. 262, 59 Stat. 318, $30,000. In the years since 1945 the appropriations for the Salt River Indian Irrigation Project and the Salt River Reclamation Project have not been specific line items. Since at least 1947, the Secretary has promulgated formal regulations which have been published in Title 25 of the Code of Federal Regulations which provide for the assessment of liens against the plaintiffs' lands to secure the collection of the Secretary's charges to cover the costs of operating and maintaining the Salt River Irrigation Project and to contribute toward the payment of operating and maintaining the Salt River Reclamation Project.

VII

The plaintiffs' allotted lands have water rights in the water of the Salt River to the extent of the reasonable agricultural needs of such lands based upon the reservation of water rights in President Rutherford B. Hayes' Executive Order of June 14, 1879, and the acts of Congress cited in paragraphs III and VI above. The plaintiffs' entitlement to water is also based upon their right under the Privileges and Immunities and Due Process clauses of the United States Constitution to share in the benefits of the Salt River Reclamation Project on no less favorable terms as do the non-Indian owners of Project lands in the Salt River Valley. The amount of water to which the plaintiffs are entitled is six acre feet per acre of irrigable land per year. The water supply of the Salt River Reclamation Project is sufficient to meet the claims of the plaintiffs' lands without diminishing deliveries to other Project lands.

VIII

The defendant, acting through the Secretary of the Interior, wrongfully refuses to deliver Salt River water to the plaintiffs' lands in accordance with their entitlements. The amount of water that the Secretary delivers from

the Salt River Reclamation Project to the Salt River Indian Irrigation Project averages 27,600 acre feet per year and this amount is delivered to 9,200 acres of irrigable allotted land. The balance of the water required to irrigate these 9,200 acres is pumped from the groundwater aquifer. Pumped groundwater is the sole source of irrigation water for an additional 5,030 acres of irrigable allotted lands. The remaining 6,770 acres of irrigable allotted lands is not cultivated because it does not have either Salt River water or pumped groundwater. The groundwater is pumped with electric power which the Secretary purchases from the Salt River Reclamation Project. The cost of this power is substantially greater than the cost of Salt River water.

IX

The defendant, acting through the Secretary of the Interior, delivers water to white landowners within the Salt River Reclamation Project on terms which are greatly more favorable than the terms of delivery to the plaintiffs' lands. White landowners are furnished Project water for all of their irrigable acres to the extent of the agricultural demands of those lands at subsidized low charges. The difference in treatment between lands owned by the plaintiffs and lands owned by whites is based upon an unjustifiable racial classification.

X

The plaintiffs have incurred damages as a result of the wrongful failure of the defendant to deliver Salt River water to their irrigable allotted lands in accordance with their entitlements. As to the lands which obtain pumped groundwater instead of their Salt River water entitlements the fair measure of the damages is the higher cost of pumped water over Salt River water. The Secretary's additional charges to the plaintiffs for pumped water in 1982 and later years have been $29.00 per acre foot. The

Secretary's additional charges for pumped water before 1982 were $15.50 per acre foot. As to the irrigable lands which do not obtain any water the fair measure of damages is the loss of rental income that would have been realized if the Secretary had not improperly refused to deliver Salt River water to these lands. The fair rental value of land in the Salt River Valley to which Salt River water is delivered is $200.00 per acre per year. By these measures the damages to an allottee owning land within the 9,200 acre area that is served partly by Salt River water and partly by pumped water is $87.00 per acre for 1982 and each year thereafter and $46.50 per acre for each year before 1982; the damages to an allottee owning land within the 5,030 acre area that is served entirely by pumped water is $174.00 per acre for 1982 and each year thereafter and $93.00 per acre for each year before 1982; and the damages to an allottee owning land within the 6,770 acres of irrigable land that is not furnished either Salt River water or pumped groundwater is $200.00 per acre per year.

WHEREFORE the plaintiffs pray that the Court enter an order certifying this action as a class action and that the class be granted judgment as follows:

1. That the owners of allotments in the 9,200 acre area served partly by Salt River water and partly by pumped water be awarded $800,400.00 as damages for 1982 and for each year thereafter and $427,800.00 for each year before 1982 for which recovery is allowed by law.

2. That the owners of allotments in the 5,030 acre area served entirely by pumped water be awarded $875,220.00 as damages for 1982 and for each year thereafter and $467,790.00 for each year before 1982 for which recovery is allowed by law;

3. That the owners of allotments in the 6,770 acre area that is not served either by Salt River water or

pumped water be awarded $1,354,000 for each year for which recovery is allowed by law; and

4. For each other relief as may be just.

SHEA & WILKS

/s/ Philip J. Shea
PHILIP J. SHEA
114 W. Adams #200
Phoenix, AZ 85003-2094
(602) 257-1126
Attorneys for Plaintiffs

IN THE UNITED STATES CLAIMS COURT

No. 205-89L

CARLTON G. ABEL (1), ELIZABETH (OSIFE) ABEL (2), DARAYNE R. ACHIN (3), ALONZO ALBERT (4), BRENDA (MANUEL) ALDOCO (5), RALSTON C. ALLEN (6), ARLENE ESCHIEF ALLISON (7), DELMAR JOHN ALLISON (8), NOREEN ALLISON (9), JOAN ALVAREZ (10), DIXON HEROD ANDERS (11), JOANNE B. ANDERSON (12), DAMON ANDREAS (13), HAZEL L. ANDREAS (14), LESLIE GENE ANDREAS (15), TEOLA (PARKER) ANDREAS (16), THERON ANDREAS (17), THEODORE ANDREAS (18), ARLENE ANDREWS (19), BURDINA ANDREWS (20), DAYTON ANDREWS (21), ELLA ANDREWS (22), JANET F. ANDREWS (23), LAHOMA ANDREWS (24), MAYNARD ANDREWS (25), MERNA ANDREWS (26), MERRITT ANDREWS (27), MICHAEL ANDREWS (28), RICHARD M. ANDREWS (29), SELMAN (ANTON) ANDREWS (30), SPENCER D. ANDREWS (31), WILLIAM BRADY ANDREWS (32), DARYL E. ANTON (33), DONALD DAVID ANTON (34), DONALD RAY ANTON (35), EDMUND JOSEPH ANTON (36), ERNEST ANTON (37), ETHEL ANTON (38), GERALD ANTON (39), GERALDINE ANTON (40), JOSEPH ANTHONY ANTON (41), JOYCE (MYRON) ANTON (42), MELVIN DOUGLAS ANTON (43), PHYLLIS ANN ANTON (44), ROBERTA LOPEZ ANTON (45), ROSEMARY ANTON (46), SHELDON ORVA ANTON (47), ALFRETTA M. ANTONE (48), AMANDA B. ANTONE (49), EDITH BADIA ANTONE (50), ELEANOR C. ANTONE (51), GWENDOLYN J. ANTONE (52), KARENIA J. ANTONE (53), KENNETH ANTONE (54), LAVINA ANTONE (55), ALVERNA ARMSTRONG (56), MARY JOYCE ARMSTRONG (57), VIRGIL ARMSTRONG (58), ARNOLD ARTHUR (59), GENE SPENCER ARTHUR (60), RAY C.

ARTHUR (61), STEVEN J. ARTHUR (62), ADELINE M. AZULE (63), DELLA ANN AZULE (64), IDELLA (ESCHIEF) AZULE (65), JERRY AZULE (66), JUSTINA AZULE (67), FRED BANASHLEY, SR. (68), PHYLLIS BANASHLEY (69), ARNOLD VERNON BAPTISTO (70), CLARENCE BAPTISTO (71), DAISY BAPTISTO (72), FLORA MAY BAPTISTO (73), JASPER BAPTISTO (74), LORETTA A. BARCELO (75), WINIFRED (WEBB) BARNAGAS (76), SHERILYN F. BELONE (77), ARCHIE BERNARD (78), MARCIA ELLEN BERNARD (79), JOSEPHINE F. BIRDCREEK (80), STEVEN D. BIRDCREEK (81), CHERYL A. (HASKIE) BITAHEY (82), DARLENE BLACKWATER (83), RENA BLACKWATER (84), SARAH BLACKWATER (85), WINONA J. BLACKWATER (86), JOSHUA BLAKE (87), CHARLES BONNAHA (88), HUBERT BONNAHA (89), IRVIN BONNAHA (90), THURZA H. BONNAHA (91), EDMUND AMOS BREAD (92), JENNIFER COOPS BRECKENRIDGE (93), MELVIN BRECKENRIDGE (94), BARBARA ANN BROWN (95), DORENE E. BROWN (96), ELVIRA BROWN (97), ERROL M. BROWN (98), EVELYN BROWN (99) LUKE S. BROWN (100), MARLENE N. BROWN (101), MILFORD LARRY BROWN (102), NADINE SANDREA BROWN (103), NELDA BROWN (104), RANDALL BROWN (105), RODERICK BROWN (106), TRUMAN BROWN (107), VIOLA (MANUEL) BROWN (108), VIRGIL BROWN (109), GAIL NORMA BUCKNER (110) ANASTASIA (MANUEL) BURKE (111), APRIL FAITH BURKE (112), CLAUDINA BURKE (113), DEBORAH BURKE (114), DENNIS RAY BURKE, SR. (115), ERNEST BURKE (116), FRANKLIN JAMES BURKE (117), GAIL ANN BURKE (118), GARY R. BURKE (119), GLADYS (FREDERICK) BURKE (120), LAVERNE (JACKSON) BURKE (121), LESLIE E. BURKE (122), LETITIA BURKE (123), RUTH BURKE (124), SUZANNE ROSE BURKE (125), THEODORE F. BURKE, SR. (126), WINIFRED BURNETTE (127), DONNA KAY BURNS (128), EVELYN (ANDREWS) BURNS (129), HARLEN GENE BURNS

(130), JACKIE DELAINE BURNS (131), JUDY ANN BURNS (132), LONDO BURNS (133), RORY BURNS (134), STEVEN RODNEY BURNS (135), VALENTINO BUDD BURNS (136), LAVINDA M. BURTON (137), LENORA (CONGER) BURTON (138), SHEILAH L. BURTON (139), JAMES ELLIOT BUTLER (140), JEANNETTE G. BUTLER (141), MELVA J. BUTLER (142), RUDY GALE BUTLER (143), CLEO CACHORA (144), MARY L. CADAVAS (145), WILLIAM CALLAWAY (146), BEVERLY MONTANA CALNIMPTEWA (147), ARTHUR CAMERON (148), RALPH CAMERON (149), TONIA (JARMILLO) CAMERON (150), WINONA MACK CAMERON (151), AURELIA ANN CARD (152), CLAYTON FIELD CARD (153), HOWARD CARD (154), LAVERNE CARD (155), NICOLE S. CARD (156), ANNIE M. CARLISLE (157), CLINTON CARLISLE (158), COLLEEN F. CARLISLE (159), DELIA CARLISLE (160), DELORES CARLISLE (161), HIRAM JOHN CARLISLE, II (162), JOANN CARLISLE (163), LINDA CARLISLE (164), ANTHONY P. CARLOS (165), BETTY ELLEN CARLOS (166), BRYCE S. CARLOS (167), CHRISTY M. CARLOS (168), CLARA MAY CARLOS (169), DENISE E. CARLOS (170), FILMORE CARLOS (171), FRANCINE CARLOS (172), FRANCINE CARLOS (173), FREDERICK CARLOS (174), HELENE CHIAGO CARLOS (175), JAMES HADLEY CARLOS (176), JUSTIN S. CARLOS, III (177), ROXANNA A. CARLOS (178), RICHARD CARLYLE (179), PATRICIA CARMEN (180), BERNARDINO CARRA, JR. (181), DAVID LEE CARRILLO (182), KAYLA CARTHEN (183), LORENZO CASSA (184), ALFRED G. CASTANEDA (185), DONNA CASTANEDA (186), GERALDINE CASTANEDA (187), RICHARD J. CASTANEDA (188), WILFORD CATHA (189), CLAUDINA (JO) CHARLES (190), GEORGINA CHARLES (191), HOUSTON L. CHARLES (192), LEONARD CHARLEY (193), ORLENE PERKINS CHAWA (194), EVELYN DICKENS CHESTER (195), ANNETTE CHIAGO (196), ANTHONY CHIAGO (197), BENNETT L. CHIAGO (198), BOYD CHIAGO SR. (199), BOYD W. CHIAGO, JR. (200),

CAROLINE CHIAGO (201), CLARA CHIAGO (202), CLARENCE CHIAGO (203), DARRELL CHIAGO (204), DELPHINA CHIAGO (205), DENNIS F. CHIAGO (206), DODSON L. CHIAGO (207), DONALD CHIAGO (208), GERALDINE CARLOS CHIAGO (209), HERBERT M. CHIAGO (210), JACKSON CHIAGO (211), JEANIE L. CHIAGO (212), JOHNNIE CHIAGO (213), LIZA ANN CHIAGO (214), LUPE (MANUEL) CHIAGO (215), MARCELLA CHIAGO (216), MARIAN CHIAGO (217), MARTIN CHIAGO (218), NANCY CHIAGO (219), NAOMI RUTH CHIAGO (220), NEIL L. CHIAGO (221), OLYMPIA CHIAGO (222), PRICILLA CHIAGO (223), REGIS CHIAGO (224), RONALD PAUL CHIAGO (225), SHIRLEY CHIAGO (226), THEODORE V. CHIAGO (227), ESTHER CHOPIN (228), RUTH MEMSON CLARK (229), WESLEY CLARK (230), BENJAMIN COLLINS (231), GRETTA T. COLLINS (232), REBECCA J. (DOKA) COLLINS (233), NICODEMUS COLT (234), EULA J.G. COLUMBUS (235), BARTON CONGER (236), EARLINE K. CONGER (237), JOYCE F. CONGER (238), JULIAN R. CONGER (239), RICHARD CONGER (240), GLENNA FAYE (MANUEL) CONTERAOUS (241), ANN MARIE COOPER (242), REGIS COOPER (243), CYNTHIA SUE COOPS (244), DEBBIE MARIE COOPS (245), LORENZO COOPS (246), MARVIN GEROD COOPS (247), GEORGIANNA CORREA (248), GLENDA BELL S. CORREA (249), GLADYS FRENCH CORTEZ (250), PATRICIA CORTEZ (251), CHARLES COUGH, JR. (252), RUTH (ENOS) CHOUGH (253), SUSAN L. CROSS (254), FLORETTA MAY CUEVAS (255), CARMELITA DALLAS (256), NOREEN DAVIS (257), DONALD RAY DEAN (258), STEVEN GEORGE DEAN (259), PERRY DELOWE (260), JANET S. DERRINGWATER (261), ADELINE JEAN DENNIS (262), EMILY HELIP DICK (263), JOAN JACKSON DIXON (264), FREDERICK DOGKA (265), MABEL K. DOGKA (266), MYRTLE CONSTANCE DOGKA (267), HAROLD LAWRENCE DOKA (268), KENNETH DOKA (269), BRUCE DONAHUE (270), LINDA BURKE DONAHUE (271), CAROLYN (PESIS) DURBIN (272), BONA-

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KENNETH HOOD (412), RICHARD ELMER HOOD (413), WILLIAM GORDON HOOD (414), EMMA SMITH HOOVER (415), DIANE HOWARD (416), ELDON HOWARD (417), ELVIRA J. HOWARD (418), ETHEL (LEONARD) HOWARD (419), FLORENCE (MANUEL) HOWARD (420), FRELEN HOWARD (421), GEORGE HOWARD (422), GERALD HOWARD (423), IRVIN M. HOWARD, JR. (424), KAREN HOWARD (425), LEAANDER HOWARD (426), LEATRICE MAE HOWARD (427), MARGARET A. (LEWIS) HOWARD (428), NANNIE HOWARD (429), RACHEL A. (LEWIS) HOWARD (430), RECHENDA J. HOWARD (431), ROGER HOWARD (432), WALLACE HOWARD (433), NICHOLE M. HULSE (434), STEVEN HUNT (435), KATHY DIANE ISK (436), BENEDICT JACKSON (437), CECELIA JACKSON (438), CLARA CONGER JACKSON (439), CONRAD E. JACKSON (440), DELBERT JACKSON (441), ERWIN JACKSON, JR. (442), ETHELENE MILES JACKSON (443), FERN ANN JACKSON (444), FERNANDO JACKSON (445), FREEMAN JACKSON (446), KATHLEEN JACKSON (447), LAWRENCE JACKSON (448), LILA JACKSON (449), LISA JACKSON (450), LOREN JACKSON (451), MALINDA JACKSON (452), MARK JACKSON (453), MERLE JACKSON (454), MILBURN V. JACKSON (455), NANCY JACKSON (456), PETER M. JACKSON (457), RANDY G. JACKSON (458), RALPH JACKSON, JR. (459), REYNALDA M. JACKSON (460), RITA MANUEL JACKSON (461), RODNEY JACKSON (462), ADELIA JAMES (463), FRED JAMES (464), FREDERICK JAMES, JR. (465), JOHNNIE MARTIN JAMES (466), LORINDA MIX JAMES (467), MARTIN JAMES (468), MYRNA JAMES (469), PETE WEYMAN JAMES (470), PHYLLIS D. JAMES (471), SALLY PANDORA JAMES (472), SARAH L. (ANTON) JAMES (473), THOMAS LEE JAMES (474), WILLIE JAMES (475), MAUREEN JANKOVICH (476), ROBERTA JEAN JARAMILLO (477), MERLE RAY JEFFERSON (478), LONITA GERALENE JIM (479), ELEANOR L. JIMINEZ (480), JULIA V. JOAQUIN (481), DANIEL WILLIAM JOE (482), BYRON JOHNS (483), SHIRLEY ANN JOHNS (484), AMANDA

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RUEDA MA KING (560), ESTHER MAY G. KISTO (561), VERONICA G. (HAYES) KISTO (562), JOYCE KLINE (563), LORNA MEMSON KLOSE (564), BEATRICE (WATERS) KYYITAN (565), VERNON REIZE KYYITAN (566), ADRIENNE L. LANE (567), CAROLYN LAPOINTE (568), THEODORE LARGO (569), WALLACE LARGO (570), ELAINE LUCINDA A. LAW (571), DORENE (DONAHUE) LENO (572), FREDERICK LEONARD (573), LUELLA BARBARA LEONARD (574), RICHARD LEONARD (575), TERRANCE LEONARD (576), THERESA LEONARD (577), NEDRA C. LERMA (578), ADRIAN LEWIS (579), ALTON LEWIS (580), AMANDA G. LEWIS (581), AMY MOORE LEWIS (582), ANITA HOWARD LEWIS (583), BARBARA (SETOYANT) LEWIS (584), CHARLENE W. LEWIS (585), CLINTON REILLY LEWIS (586), DANIEL LEWIS (587), DAVID J. LEWIS, JR. (588), DAVIS LEWIS (589), DAWN KIMBERLY LEWIS (590), DELVIN VERDIE LEWIS (591), DORAJEAN LEWIS (592), DOROTHY MORGAN LEWIS (593), EDWARD T. LEWIS, JR. (594), EDWARDINE LEWIS (595), ELEANOR (KAVOKA) LEWIS (596), EMMA JOHNSON LEWIS (597), EVELYN C.M. LEWIS (598), FRANCISCO J. LEWIS, SR. (599), FRED LEWIS (600), GLENFORD J. LEWIS (601), JANICE M. LEWIS (602), JONATHAN LEWIS (603), LEON ERROL LEWIS (604), MARY FRANCES LEWIS (605), MERNA L. LEWIS (606), MONROE LEWIS (607), MYRA LEWIS (608), NORMA E. LEWIS (609), OSCAR LEWIS (610), RAEBURN LEWIS (611), RAYMOND LEWIS (612), RICHARD LEWIS (613), ROBERT LEWIS (614), RUPERT DEAN LEWIS (615), SPENCER THOMAS LEWIS (616), STEPHANIE LEWIS (617), TAMMY LEWIS (618), VELDINA LEWIS (619), VERA (MILES) LEWIS (620), WILMA JEAN LEWIS (621), FRANCES (HARVEY) LOPEZ (622), HERMAN EMERSON LOPEZ (623), LINDELL RAY LOPEZ (624), LYNFORD E. LOPEZ (625), SHIRLEY A. LOPEZ (626), SUSIE (VAVAGES) LOPEZ (627), RAMONA LORING (628), DONNA MARIE LOVATO (629), ROSELLA LOVATO (630), TERESA ANN LOVATO (631), ROSE

MARIE LOWE (632), FRANCES LEWIS LUCAS (633), ETHEL J. LUDLOW (634), FRANK LUDLOW, JR. (635), MAURICE G. LUDLOW (636), LUCILLE MARIE LYONS (637), RICHARD LYONS (638), CORLEEN MACK (639), ELSIE MACK (640), EUGENE MACK (641), IRVIN MACK (642), MITCHELL MACK (643), RONALD L. (KYITAN) MACK (644), ROLAND MACKETT, JR. (645), BERNADINE (PESIS) MAHLE (646), CAROLYN F. MAKIL (647), DAPHNE MAKIL (648), ELIZABETH ANN MAKIL (649), ESSIE (LYONS) MAKIL (650), ETHELEEN ENOS MAKIL (651), IVAN M. MAKIL (652), JOEY MAKIL (653), KEVIN MAKIL (654), MILFORD JOHN MAKIL (655), ROSA MAKIL (656), SHERON MAKIL (657), SIMON MAKIL (658), VICTORIA MAKIL (659), ALLEN RODERICK MANUEL (660), ANASTACIA (OSIFE) MANUEL (661), BENNETT LLOYD MANUEL (662), BENNETT L. MANUEL, SR. (663), BONNIE MANUEL (664), BRIAN MANUEL (665), CATHERINE E. MANUEL (666), CHARLENE MANUEL (667), CLARA (SETOYANT) MANUEL (668), DELBERT HOLLIS MANUEL (669), DELVIN D. MANUEL (670), DILLION ALDO MANUEL (671), EARLINE THOMAS MANUEL (672), EDDIE LEON MANUEL (673), ELLA SMITH MANUEL (674), ELLIOTT L. MANUEL (675), GARY TITUS MANUEL (676), GERMAINE JUAN MANUEL (677), GILBERT GARCIA MANUEL (678), GLEN MANUEL (679), GLENNA MANUEL (680), HERMAN MANUEL (681), HILDA E. MANUEL (682), JERRY E. MANUEL (683), JOHN CHARLES (HAYES) MANUEL (684), JOHN GARRETT MANUEL (685), JULIAN M. MANUEL (686), LARRY MELVIN MANUEL (687), LAZARUS L. MANUEL, SR. (688), LEON JAMES MANUEL (689), LESTER L. MANUEL (690), LORENE DORIS MANUEL (691), LORINNA LEE MANUEL (692), MARLENE MANUEL (693), MARY A. MANUEL (694), MAY JOSEPHINE MANUEL (695), MILDRED HAYES MANUEL (696), MILTON MANUEL (697), MURRAY MANUEL, SR. (698), PATRICK MANUEL, JR. (699), RAYNARD RUDY MANUEL

(700), ROBERT MANUEL (701), SHARON (COUGH) MANUEL (702), SHIRLENE MANUEL (703), VICTOR MANUEL (704), VIOLET MANUEL (705), DONALD C. MARRIETTA (706), MARY A. MARRIETTA (707), MITCHELL MARRIETTA (708), VIRGINIA (JONES) MARRIETTA (709), AGNES L. LEWIS MARTINEZ (710), BELVA J. (SAMPSON) MARTINEZ (711), CLEMENICA G. MARTINEZ (712), IMOGENE BELL MARTINEZ (713), LORETTA (HASKIE) MARTINEZ (714), RICHARD MARTINEZ (715), SHIRLEY ANN MARTINEZ (716), VERONICA MARTINEZ (717), CHARLES A. MATTHEWS (718), IRA MATTHEWS (719), HARRIETT (HOOD) MENDEZ (720), ROSEMARY MORISTO MAGILL (721), JOHN MCKINN, JR. (722), JOHN V. MCKINN (723), KATHLEEN A. MCKINN (724), PAULINE CAROL MENA (725), ANDERSON MIGUEL, JR. (726), ANDREW LEMUEL MIGUEL (727), BETSEY B. MIGUEL (728), EILEEN MIGUEL (729), HAROLD MIGUEL (730), IRENE MIGUEL (731), JULIA FRANCISCO MIGUEL (732), KELVIN MIGUEL (733), LOREN GORDON MIGUEL (734), ROLAND LEON MIGUEL (735), MARGARET HOWARD MILDA (736), ALICIA RENEE MILES (737), ALVIN GAIL MILES (738), AVERY ANTHONY MILES (739), BARBARA JEAN MILES (740), BENITA GLENNA MILES (741), DALE MILES (742), DARLINE MILES (743), DELORES MILES (744), DENNY LEE MILES (745), ELDON C. MILES (746), GWENDOLYN I. MILES (747), JOE MILES (748), KATHRYN JOSE MILES (749), KERVIN MILES (750), MERVIN MILES (751), SILAS MILES (752), WELDON MILES (753), BRADY G. MILLER (754), ERLINDA KING MILLER (755), JODY V. MILLER (756), LINDA MILLER (757), MARCELLA A. JOSE MILLER (758), MARTHA MILLER (759), VENITA ANN MONGE (760), FLORA D. (VEST) MONTAGUE (761), JANICE MOONEY (762), INEZ ROSCHELLE MORAN (763), BRENDA MOORE (764), DANIEL MOORE (765), EDNA QUAHOIEMA MOORE (766), ELLA JOHNSON MOORE (767), CYNTHIA J. (LESLIE) MOQUINO

(768), EDNA (VICTORIAN) MORENO (769), BONNIE W. MORGAN (770), ETHEL (RHOADES) MORGAN (771), JENNIFER MORGAN (772), LYMAN GEORGE MORGAN (773), BEULAH MORISTO (774), BEVERLY MORISTO (775), CHARLENE MORISTO (776), ERNEST MORISTO (777), JANICE MORISTO (778), ROSE MARY MORISTO (779), WALLACE MORISTO (780), SYLVIA MORISTO (781), FRIONA JOYCE MOYAH (782), HAZEL GILDA MOYAH (783), JUDY A. MOYAH (784), TERRANCE MOYAH (785), VICTOR MOYAH (786), NANCY MARIA MURILLO (787), LORENA (GONZALES) NACHO (788), BARBARA J. NAPALEE (789), ALBAH GONZALES NARCIA (790), ROGER NARCIA (791), ALTA JEAN NAVARRO (792), CARLITA (CLARA) NELSON (793), CELESTINE F. NELSON, JR. (794), CRAIG CLEO NELSON (795), LEMUEL C. NELSON (796), MADELINE C. NELSON (797), STACEY NELSON (798), KAREN NISH (799), RICHARD NISH (800), RICHARD LEE NISH (801), DARLENE M. (ENOS) NORRIS (802), FRANCES J. NUMKENA (803), GLORIA GARCIA OLDS (804), GERALDINE (VEST) OLEMEDO (805), JON PAUL OLIVAS (806), ROBERT OLIVAS (807), CAROL MARIE K. (GOODWIN) ONTIBEROS (808), BRUCE C. OSIF (809), KATHLEEN OSIF (810), LAWRENCE OSIF (811), MARILYN E. OSIF (812), MARY D. OSIF (813), CLAYBORN L. (HAROLD) OSIFE (814), EILEEN L. OSIFE (815), NORMAN OSIFE (816), VICTOR OSIFE (817), WALTER OSIFE (818), CHRISTINE F. OWENS (819), AGNES (VAVAGES) PABLO (820), ELIZABETH NISH PABLO (821), JUANITA F. PABLO (822), WANDA (SANTO) PABLO (823), ANGELICA L. PACHECO (824), MURRAY PACHECO (825), WINIFRED LEATRICE (SAMPSON) PARKER (826), MARTIN NEIL PARSONS (827), ANITA F. PASCUAL (828), PHYLLIS ANN PATRICK (829), EDNA WATUEMA PAUL (830), LLOYD GEORGE PAUL (831), ETHELINE R. PAXSON (832), CLINTON PEDRO (833), MARILYN (LAMORE) PEDRO (834), GLADYS PERKINS (835), MARVIN H. PERKINS

(836), VIRGINIA PERKINS (837), HELENA MAE PESIS (838), JON ELWOOD PESIS (839), KATHLEEN LELA PESIS (840), MAY (THOMAS) PESIS (841), SYBIL ARLENE PESIS (842), COLLEEN D. PETERS (843), EDWARD PETERS (844), SYLVESTER PETERS (845), THERESA B. PETERS (846), ALEXANDER PHILLIPS (847), BERNICE PHILLIPS (848), BRADY PHILLIPS (849), BRENDA J. PHILLIPS (850), CARSON PHILLIPS (851), DAVID PHILLIPS (852), DIANA CAROL PHILLIPS (853), HAZEL PHILLIPS (854), MILTON PHILLIPS (855), PAUL DEAN PHILLIPS (856), RUSSELL PHILLIPS (857), THELMA PHILLIPS (858), WILLIAM ROGER PHILLIPS (859), CYNTHIA PINCKNEY (860), ROSEMARY (JOHNSON) PINTO (861), ANTOINETTE (CHIAGO) PLATT (862), ANGELITA L. JUAN PONSELLE (863), BRENDA PORTEE (864), DULCINA B. PORTER (865), RAMONA JOHNSON POST (866), LOUISE GATES PUGGIE (867), HAZEL QUESADA (868), ROSE MARIE QUMYINTEWA (869), ENA RAE RAMON (870), HENRY RAMON (871), DELORES RANGEL (872), ANNETTA RAVE (873), CHRISTINA RAY (874), DELBERT W. RAY, SR. (875), EARL PHILLIP RAY (876), ELSWORTH G. MAKIL RAY (877), EVANS RAY (878), FRANCES (JAMES) RAY (879), GLENN PERKINS RAY (880), HARRY JOHN RAY, JR. (881), HERMAN DEAN RAY (882), KERRY GENE RAY (883), MARIETTA RAY (884), MARY (SINICH) RAY (885), CYNTHIA ANNIE REAMS (886), WILMA (CAMERON) REDBIRD (887), EDWARD REINA, JR. (888), ROGER REYNOLDS (889), BETTY ANN RHOADES (890), EFFIE LEE RHOADES (891), LILLIAN ENOS RHOADES (892), ELTON EVERETT RHODES (893), EMALINE ETTA RHODES (894), ERICK FLOYD RHODES (895), EVERETT RHODES (896), FLORENCE CHIAGO RHODES (899), HARRISON RHODES (898), VIVIAN RHODES (899), HARLAN RICHARDS (900), ROSE M. (SMITH) RICHARDS (901), VIRGINIA CARLOS RICHARDS (902), BERNADINE RICKER (903), LILLIAN WILSON RIDEAU (904), ANTONIO M.

Riena (905), Shirley Ann Riena (906), Kearney Jon Ringlero, Sr. (907), Louis Ringlero, Jr. (908), Amanda Ellen Rivers (909), Anna R. Juan Rivers (910), Carol Joyce F. Rivers (911), Hazel Juanita Rivers (912), Loren Rivers, Jr. (913), Loren Rivers, Sr. (914), Norene (Chiago) Rivers (915), Patsy Marie A. Rivers (916), Mervin Lee Roberts (917), Brenda L. (Adams) Robertson (918), Phyllis Robinson (919), Elmira M. (Manuel) Robles (920), Mirian Rodriguez (921), Earlene Rodriquez (922), Adolph Romo, Jr. (923), Gloria Lopez Rose (924), Clairee (Donahue) Rovie (925), Alexander Roy (926), Frank Roy, Jr. (927), Lenora M. Roy (928), Mich Roy (929), Susan Jane Roy (930), Stella (Matthews) Ruiz (931), Elmira J. Russell (932), Nathanial C. Russell, Jr. (933), Vera Ellen Salazar (934), Abigail Joy Salcido (935), Dallas F. Salkey (936), Delbert Frank Salkey (937), Randy Larnell Salkey (938), Shannon Salkey (939), Verdie Salkey (940), Walter James Salkey (941), Lawrence D. Sam (942), Marvin W. Sam (943), Bradford Dale Sampson (944), Carrol John Sampson (945), Chris Georgette Sampson (946), Corrine Smith Sampson (947), Imogene Sampson (948), Joyce Marlene Sampson (949), Lajuana Sampson (950), Vernice Cheryl Sampson (951), Vernita Faye Sampson (952), Gloria Sanchez (953), Marlene (Manuel) Sandoval (954), Edith B. Santeo (955), Edwin Charles Santeo (956), Ambrose Santo (957), Audrey A. Santo (958), Basil Santo (959), Naomi Williams Santo (960), Carole E. (Lane) Santos (961), Clement Santos, Jr. (962), Burleigh C. Saunders (963), Fred K. Saunders (964), Harold Royal Schurz (965), Harvey L. Schurz (966), Merlin Schurz (967), Shirley Ann Schurz (968), Brandon Mix Scott (969), Calvin Frank Scott

(970), Cynthia Sue Scott (971), Gail Scott (972), Marilyn Joella Scott (973), Vickie Lee Scott (974), Winifred Scott (975), Ida Ferguson Sebahe (976), Roberta Seepie (977), Sharon A. Selestewa (978), Alexander Senich (979), Elida Bernard Senich (980), Marian French Senich (981), Norma G. Senich (982), Delphina F. Seota (983), Faithe Seota (984), Benedict C. Setoyant (985), Delvina Leyva Setoyant (986), Ernestine Shaw (987), Florice Madelyn Shaw (988), Frank Lee Shaw (989), Gilbert Charles Shaw (990), Paul S. Shaw (991), Sadie Shaw (992), Thelma D. Shaw (993), Donald Shelton (994), Betty Bonnaha Shepherd (995), Bubba Shepherd (996), Frances George Short (997), Marinita B. (Carlos) Short (998), Glorianna G. Sinclair (999), Eleanor Mae Silversten (1000), Allen Smith (1001), Annalita Gates Smith (1002), Eleanor Smith (1003), Eli Leonard Smith (1004), Harry Jayroe Smith (1005), Lansferd Smith (1006), Levi Smith (1007), Lloyd G. Smith (1008), Lolita Smith (1009), Lorraine Ruby Smith (1010), Paul J. Smith (1011), Stephanie M. Smith (1912), Theron L. Smith (1013), Alvina Snyder (1014), Angelia Snyder (1015), Corrine C. Soke (1016), Agnes Eschief Soliz (1017), Raymond Soos, Sr. Rosemary Soos (1018), Vernon Soos (1019), Janice Sordia (1020), Harriet Stacey (1021), Alexander J. Stanley (1022), Delbert (Delmar) Lee Stanley (1023), Iva Ennis Stanley (1024), Madeline Stanley (1025), Andrea Shaw Stepp (1926), Amanda Stevens (1027), Beverly Ann Stewart (1928), Dwane Andy Stewart (1029), Glenn Gregory Stewart (1030), Jasper Stewart (1031), Lamuel Dean Stewart (1032), O'Brien Stewart (1033), Sheila Ann Stewart (1034), Alvin Anthony Stone (1035), Cedric Dean Stone (1036), Everett Stone, Sr. (1037), Adolph P.

Strouse (1038), Herman Pacheco Strouse (1939), Doris Sunn (1040), Sheila B.J. Tanner (1041), Taberon Lee Tashquinth (1042), Veronica Tashquinth (1043), Anna Marie Tate (1044), Susan Morgan Taylor (1045), Lorraine (Johnson) Terrazas (1046), Alice Baptisto Terry (1047), Carlton Henry Terry (1048), Cecil Leonard Terry (1049), Danny Terry (1050), Edna W. Terry (1051), Geraldine Thomas Terry (1052), Lena Allison Terry (1053), Thelma D. (Enos) Terry (1054), Tomassa Terry (1055), Barrie Ann Thomas (1056), Cecil G. Thomas (1057), Cecil Wade Thomas (1058), Coyd H. Thomas (1059), Curtis Phillip Thomas (1060), Delphia Faye Thomas (1061), Dewitt Thomas (1062), Donald Thomas (1063), Frank Thomas (1064), Gary Lee Thomas #1 (1065), Gary Lee Thomas #2 (1066), George Anders Thomas (1067), Glenda Ruby Thomas (1068), Gwendolyn L. Thomas (1069), Huey Thomas (1070), Jacqueline Faye Thomas (1071), Jeri Anne Thomas (1072), Joseph William Thomas (1073), Kenneth Willard Thomas (1074), Lamar Tony Thomas (1075), Laurie Thomas (1076), Leigh Ann Thomas (1077), Lindsay Bryan Thomas (1078), Lorna D. (Adams) Thomas (1079), Magdalene Thomas (1080), Marcella (Juan) Thomas (1081), Martin Thomas (1082), Mary A.L. Thomas (1083), Phillip (Cromwell) Thomas (1084), Robert Thomas (1085), Ronald Edwin Thomas (1086), Velma Jean Thomas (1087), Vernon Brown Thomas (1088), Vincent Thomas (1089), Wilma Mae Thomas (1090), Luanne C. Thompson (1091), Rachael F. (Joe) Thompson (1092), Lucille Throssell (1093), Sanford Throssell (1094), Stanley Throssell (1095), Verna Throssell (1096), Gladys Chalaco Tisi (1097), Andreana E.K. Torres (1098), Clarita Castil Wateuma

Tolth (1099), Jacqueline L. Torres (1100), Angelita (Senich) Toya (1101), Andrew Valdez (1102), Cecelia Manuel Valdez (1103), Marilyn Valenzuela (1104), Raymond Valenzuela (1105), Thelma Valenzuela (1106), Lottie Vasquez (1107), Adeline Vest (1108), Bert Vest (1109), Betty Vest (1110), Bryan Sterling Vest (1111), Edmund Vest (1112), Gary Vest (1113), Gilmore Haynes Vest (1114), Gloria Vest (1115), Laurel George Vest (1116), Ronda Vest (1117), Sylvia Vest (1118), Velma Vest (1119), Vernal Vest (1120), Wilbur Vest, Jr. (1121), Arlene Victorian (1122), Christine Victorian (1123), Georgiann Victorian (1124), Harold P. Victorian (1125), Leroy Sebastian Victorian, Jr. (1126), Janet Victorian (1127), Mary Corrine Victorian (1128), Mary G. (Anton) Victorian (1129), Rodney R. Victorian (1130), Rosaline Victorian (1131), Vincent Victorian (1132), Trudy K. Villa (1133), Bernice (Juan) Vincent (1134), Patricia Ann Wahepta (1135), Carlos Walker (1136), Ruben Walker (1137), Tonita M. Walker (1138), Allen Ray Washington (1139), Dennett Washington (1140), Frederick Washington (1141), Jerry Washington (1142), Leon Washington (1143), Nina Thomas Washington (1144), Raymond Washington (1145), Ruthella Washington (1146), Wanima W. Washington (1147), Harriet Waters (1148), Jessie Miguel Waters (1149), Malinda Waters (1150), Silas Waters (1151), Bert Wateuma (1152), Malcolm Wateuma (1153), Marlene (Piaso) Wateuma (1154), Ira Wateuma (1155), Patrick Wateuma (1156), Donald Franklin Webb (1157), Doretta Ann Webb (1158), Emory D. Webb (1159), Julia Ann Webb (1160), Katherine Marie Webb (1161), Michael Blaine Webb (1162), Ina (Washington) Webster (1163),

CLIFFORD WELLINGTON (1164), CORA WELLINGTON (1165), DELBERT WELLINGTON (1166), ELMER WELLINGTON (1167), JOSHUA WELLINGTON (1168), LOUVELLA P. WELLINGTON (1169), MADGE WELLINGTON (1170), ANITA (THOMAS) WELLS (1171), EVELYN (RUSSELL) WHITE (1172), INEZ J. CONGER WHITE (1173), MICHAEL THOMAS WHITE (1174), RICHARD (THOMAS) (PARKER) WHITE (1175), CHERYL ANN WHITLOCK (1176), DARYL ELAINE WHITLOCK (1177), ROBERTA WHITLOCK (1178), BARBARA ANN WHITMAN (1179), BETTY J. WHITMAN (1180), MERLE F. WHITMAN (1181), DOROTHY WHITTAKER (1182), PEGGY (ALTON WHITTIER (1183), ANNA WILEY (1184), BETTY JANE WILEY (1185), DELORES WILEY (1186), JOSEPHINE WILEY (1187), LILLIAN WILEY (1188), SHIRLEY WILEY (1189), BARBARA DEAN WILLIAMS (1190), CLIFFORD WILLIAMS (1191), GERALD WILLIAMS (1192), GUSSIE RAY WILLIAMS (1193), LAVINA WILLIAMS (1194), LELAND WILLIAMS (1195), REBECCA ANN WILLIAMS (1196), TILLMAN WILLIAMS (1197), ASA ELIJAH WILSON (1198), DOUGLAS WILSON (1199), MILDRED J. WILSON (1200), GLADYS COUGH WILSON (1201), JONATHAN WILSON (1202), JULIE SIENNA (GATES) WILSON (1203), REUBEN WILSON (1204), ROBERT WASHINGTON WILSON (1205), TIMOTHY WILSON (1206), JOANN CURRAN WINANS (1207), BARBARA WOOD (1208), BEN WOOD, JR. (1209), BEN WOOD, SR. (1210), GORDON WOOD (1211), MATILDA (STEWART) WOOD (1212), MYRTLE LOUISE WOOD (1213), SANDRA L. YBARRA (1214), MADELINE GEORGE YOUNG (1215), VIRGINIA MACK YOUNG (1216), BERNALENE S. YUCUPISIO (1217), RENA ROSE ZOTIGH (1218), *Plaintiffs,*

-VS-

THE UNITED STATES OF AMERICA,
Defendant.

FIRST AMENDED COMPLAINT

I

This is an action for damages arising from the unlawful failure of officials of the United States to deliver irrigation water from the Salt River to the allotted lands of the Salt River Pima-Maricopa Indian Reservation. The jurisdiction of this Court is conferred by the Tucker Act, 28 U.S.C. § 1491. The defendant has expressly and specifically given consent to maintain this action for damages in Section 10(a)(4) of the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, 102 Stat. 2549, (the "Settlement Act"), enacted on October 20, 1988.

II

The plaintiffs are owners of allotted land on the Salt River Pima-Maricopa Indian Community reservation located east of Phoenix in the Salt River Valley of central Arizona. The reservation was reserved from public lands along the Salt River by the Executive Order of President Rutherford B. Hayes dated June 14, 1879, to provide an agricultural economy for the Pima and Maricopa Indians of the Salt River Community based upon water rights in the Salt River. The plaintiffs' lands were allotted by the defendant so that they could be used for agricultural purposes with irrigation water supplied by the Salt River Reclamation Project pursuant to Section 1 of the General Allotment Act of February 8, 1887, Ch. 119, 24 Stat. 389, as amended by section 17 of the act of June 25, 1910, Ch. 431, 36 Stat. 859, 25 U.S.C. § 331. The defendant holds these lands in trust for the plaintiffs' sole use and benefit pursuant to section 5 of the General Allotment Act, 25 U.S.C. § 348.

III

The defendant controls totally and exclusively the storage and distribution of Salt River water through the facilities of the Salt River Reclamation Project. Project

storage facilities include four dams on the Salt River and two dams on the Salt's principal tributary, the Verde River, which collect and control the runoff in a 13,000 square mile watershed. The defendant distributes the water developed by the project within the Salt River Valley, a 350 square mile area which includes Phoenix and its suburban cities, non-Indian farmlands and Salt River reservation farmlands. The project is fully owned by the defendant and administered by the Secretary of the Interior under the reclamation laws which include principally the Reclamation Act of June 17, 1902, Ch. 1093, 32 Stat. 388, 43 U.S.C. §§ 391 et seq.; the Warren Act of February 21, 1911, Ch. 141, 36 Stat. 925, 43 U.S.C. § 523; the Reclamation Extension Act of August 13, 1914, Ch. 247, 38 Stat. 686; the act of August 11, 1916, Ch. 319, 39 Stat. 506, 43 U.S.C. §§ 621-630; the Omnibus Adjustment Act of May 25, 1926, Ch. 383, 44 Sat. 636; and the Reclamation Project Act of August 4, 1939, Ch. 418, 53 Stat. 1187, 43 U.S.C. §§ 485-485(k).

IV

The defendant controls totally and exclusively the distribution of water to the plaintiffs' lands, and the defendant unilaterally fixes the charges for such deliveries, through an irrigation management regime operated pursuant to 25 U.S.C. §§ 381-382, 384-385, and regulations issued by the Secretary of the Interior pursuant to those statutes.

V

The defendant, through the Secretary of the Interior, causes injury to the plaintiffs through illegal acts performed in the administration of the plaintiffs' trust allotments and in the distribution of Salt River water in the Salt River Valley as follows:

(a) The defendant delivers more project water per acre at lower prices to non-Indian farmlands than to the

plaintiffs' lands based solely on the fact that the plaintiffs are American Indians;

(b) The defendant refuses to deliver project water to plaintiffs' lands to the extent of their entitlements under the Executive Order dated June 14, 1879; under the decree in *Hurley v. Abbott*, entered on March 1, 1910, in cause no. 4564, in District Court for the Third Judicial District of the Arizona Territory; and under the act of May 18, 1916, Ch. 125, 39 Stat. 123; and

(c) The defendant maintains an inefficient delivery system for the service of irrigation water to plaintiffs' lands while maintaining an efficient delivery system through use of federal subsidies for comparable non-Indian lands. The economic injury to the plaintiffs caused by these illegal acts is $200.00 per acre per year.

VI

The plaintiffs' tribal government, the Salt River Pima-Maricopa Indian Community Council, has agreed with the defendant and others to terms of a settlement under which the amount of water per acre that the defendant delivers to plaintiffs' lands will be equivalent to the amount delivered per acre to non-Indian lands; the defendant's charges for water delivered to the plaintiffs' lands will be equivalent to its charges for water delivered to non-Indian lands; and the delivery system serving the plaintiffs' lands will be made equivalent to the system which serves non-Indian lands. The settlement does not fix the amount of damages to which the plaintiffs are entitled for the economic loss they have incurred as a result of the deprivations described in paragraph V.

VII

The settlement described in paragraph VI was approved by the defendant in the Settlement Act of October 20, 1988. Under the Settlement Act the question of dam-

ages incurred by the plaintiffs for deprivation of water rights has been referred to this Court for determination. The pertinent provisions of the Settlement Act are as follows:

(a) Section 10(a)(1)(A) of the act extinguishes the plaintiffs' claims for damages against the defendant for deprivation of water rights through December 31, 1991;

(b) Section 10(a)(4) of the act grants consent to the plaintiffs to maintain this action against the defendant in this Court pursuant to 28 U.S.C. § 1491 for damages, if any, for the extinguishment of claims effected by Section 10(a)(1)(A) of the act;

(c) Section 10(a)(6)(A) of the act provides that the defendant may assert as a defense in this action the six-year limitation of 28 U.S.C. § 2501 but it may not assert a timeliness defense as to damages incurred within six years before the commencement of this action; and

(d) Section 10(a)(4) permits this action to be maintained as a class action.

VIII

The plaintiffs maintain this action on behalf of the class of owners of irrigable alloted lands on the Salt River reservation. A class action is particularly appropriate because the claims of all such owners have been extinguished by the Settlement Act and many of them who are not named plaintiffs have not had notice of such extinguishment.

WHEREFORE the plaintiffs pray for certification of this case as a class action; for judgment against the defendant in the sum of $200.00 per acre of irrigable allotted lands on the Salt River reservation per year; and for such other relief as may be just.

Dated: April 20, 1989.

SHEA & WILKS

/s/ Philip J. Shea
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Public Law 100-512
100th Congress

An Act

To provide for the settlement of the water rights claims of the Salt River Pima-Maricopa Indian Community in Maricopa County, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988".

SEC. 2. CONGRESSIONAL FINDINGS.

(a) The Congress finds and declares that—

(1) it is the policy of the United States, in fulfillment of its trust responsibility to Indian tribes, to promote Indian self-determination and economic self-sufficiency, and to settle, wherever possible, the water rights claims of Indian tribes without lengthy and costly litigation;

(2) meaningful Indian self-determination and economic self-sufficiency largely depend on development of viable Indian reservation economies;

(3) quantification of rights to water and development of facilities needed to utilize tribal water supplies effectively is essential to the development of viable Indian reservation economies, particularly in arid western States;

(4) on June 14, 1879, the United States Government established a reservation for the Salt River Pima-Maricopa Indian Community in Maricopa County, Arizona, at the confluence of the Salt and Verde Rivers tributary to the Gila River;

(5) the United States, as trustee for the Community, obtained water entitlements for the Community pursuant to the Kent Decree of 1910 and the Bartlett Dam Agreement of 1935; however, continued uncertainty as to the full extent of the Community's entitlement to water has severely limited the Community's access to the water and financial resources necessary to develop its valuable agricultural lands and frustrated its efforts to reduce its dependence on Federal program funding and achieve meaningful self-determination and economic self-sufficiency;

(6) litigation to determine the full extent and nature of the Community's water rights and those of its allotted land owners, and damages thereto, is currently pending before the United States District Court in Arizona and in the United States Claims Court. The United States, as trustee for the Community, also has filed claims for the Community's water rights in the General Adjudication of the Gila System and Source currently pending in the Superior Court of the State of Arizona in and for the County of Maricopa;

(7) recognizing that final resolution of pending litigation will take many years and entail great expense to all parties, continue economically and socially damaging limits to the Community's access to water, prolong uncertainty as to the availability of water supplies and seriously impair the long-term economic planning and development of all parties, the Community and neighboring non-Indian communities

have sought to settle their disputes to water and reduce the burdens of litigation;

(8) after more than two years of negotiations, which included participation by representatives of the United States Government, the Community and neighboring non-Indian communities of the Salt River Valley, who all are party to the General Adjudication of the Gila River System and Source, the parties have entered into an agreement to resolve all water rights claims between and among themselves, to quantify the Community's entitlement to water, to provide for the orderly development of the Community's lands, and to prescribe a procedure for resolving such remaining claims which the Community and its allottees may have against the United States;

(9) pursuant to the agreement, the neighboring non-Indian communities will transfer rights to approximately thirty-two thousand acre-feet of surface water to the Community, provide for the means of firming existing water supplies of the Community, and make substantial additional contributions to carry out the agreement's provisions; and

(10) to advance the goals of Federal policy and to fulfill the trust responsibility of the United States to the Community, it is appropriate that the United States participate in the implementation of the agreement and contribute funds for the rehabilitation and expansion of existing reservation irrigation facilities so as to enable the Community to utilize fully its water entitlements in developing a diverse, efficient reservation economy.

(b) Therefore, it is the purpose of this Act (1) to approve, ratify and confirm the agreement entered into by the Community and its neighboring non-Indian communities, (2) to authorize and direct the Secretary to execute and perform such agreement, and (3) to au-

thorize the actions and appropriations necessary for the United States to fulfill its legal and trust obligations to the Community as provided in the agreement and this Act.

SEC. 3. DEFINITIONS.

For the purposes of this Act—

(a) "Agreement" means that agreement dated February 12, 1988, among the Salt River Pima Maricopa Indian Community; the State of Arizona; the Salt River Project Agricultural Improvement and Power District; the Salt River Valley Water Users' Association; the Roosevelt Water Conservation District; the Roosevelt Irrigation District; the Arizona cities of Chandler, Glendale, Mesa, Phoenix, Scottsdale, and Tempe, and the Arizona town of Gilbert; and the Central Arizona Water Conservation District, together with all exhibits thereto.

(b) "Allottees" means owners of allotted land within the Salt River Pima-Maricopa Indian Reservation.

(c) "Bartlett Dam Agreement" means the agreement between the United States and the Salt River Valley Water Users' Association dated June 3, 1935, relating to Verde storage works.

(d) "CAP" means the Central Arizona Project, a reclamation project authorized under title III of the Colorado River Basin Project Act of 1968 (43 U.S.C. 1521 et seq.).

(e) "CAWCD" means the Central Arizona Water Conservation District, organized under the laws of the State of Arizona, which is the contractor under a contract with the United States, dated December

15, 1972, for the delivery of water and repayment of costs of the Central Arizona Project.

(f) "Community" means the Salt River Pima-Maricopa Indian Community, a community of Pima and Maricopa Indians organized pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 461 et seq.).

(g) "Kent Decree" means the decree dated March 1, 1910, entered in Patrick T. Hurley versus Charles F. Abbott, and others, Case Numbered 4564, in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, and all decrees supplemental thereto.

(h) "Plan 6 Agreement" means the agreement among the United States; the CAWCD; the Flood Control District of Maricopa County; SRP; the Arizona cities of Chandler, Glendale; Mesa, Phoenix, Scottsdale, and Tempe; the State of Arizona; and the City of Tucson, for funding of Plan 6 facilities of the CAP, and for other purposes, dated April 15, 1986, together with Exhibits A, B, C, and D thereto.

(i) "RID" means the Roosevelt Irrigation District, an irrigation district organized under the laws of Arizona.

(j) "RWCD" means the Roosevelt Water Conservation District, an irrigation district organized under the laws of the State of Arizona.

(k) "Secretary" means the Secretary of the United States Department of the Interior.

(l) "SRP" means the Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, and the Salt River Valley Water Users' Association, an Arizona corporation.

SEC. 4. KENT DECREE REREGULATION.

(a) The Secretary is authorized and directed to designate seven thousand acre-feet (hereinafter referred to as "Designated Space") of the additional active conservation capacity which will result from the modifications to Roosevelt Dam on the Salt River previously authorized by the Reclamation Safety of Dams Act of 1978, as amended (43 U.S.C. 506 et seq.), the Colorado River Basin Project Act of 1968 (43 U.S.C. 1501 et seq.), and the relevant provisions relating to "Construction Program" contained in title II of the Act making appropriations for energy and water development for the fiscal year ending September 30, 1988, and for other purposes (Public Law 100-202), to be used for the reregulation of the Community's entitlement to water under the Kent Decree. The Designated Space shall be used for seasonal reregulation only, with no annual carry-over past October 1.

(b) The costs associated with the Designated Space shall be nonreimbursable, and the non-Federal funding obligation associated with the Designated Space under the Plan 6 Agreement and any supplement thereto is hereby forgiven.

SEC 5. BARTLETT DAM AGREEMENT.

(a) The Secretary is directed to amend the Bartlett Dam Agreement to provide that the Salt River Valley Water Users' Association shall increase the total Community allotment of developed water to twenty thousand acre-feet on December 31 of any calendar year in which all of the following three conditions occur:

(1) for at least two hundred and ninety-two days of the calendar year the total water stored in Salt River Valley Water Users' Association reservoirs on the Verde River is more than the storage capacity of Bartlett Dam Reservoir, which, for the purposes

of this Act, is deemed to be one hundred seventy-eight thousand, one hundred eighty-six acre-feet, as periodically adjusted by the Salt River Valley Water Users' Association for silt losses;

(2) the total Community allotment of developed water under the Bartlett Dam Agreement generated during the calendar year is less than seven thousand acre-feet;

(3) the total Community allotment of developed water under the Bartlett Dam Agreement existing at the end of the calendar year is less than twenty thousand acre-feet.

(b) Article 4 of the Bartlett Dam Agreement shall be deleted and replaced with the following language: "ARTICLE 4. OPERATION OF STORAGE WORKS 'The works to be constructed upon Verde River shall be operated and maintained by the Association. The Association may at any time store any part or all of Flow of Verde River in the reservoir, and may at any time release any quantity of water from the reservoir or it may permit the river to flow through the reservoir without regulation.' ".

(c) Except as provided in subsections (a) and (b), all terms of the Bartlett Dam Agreement shall remain unchanged and in full force and effect.

SEC. 6. RATIFICATION AND CONFIRMATION OF CONTRACTS.

(a) The contract between the Salt River Valley Water Users' Association and the Carrick and Mangham Aqua Fria Lands and Irrigation Company (the predecessor of the Roosevelt Irrigation District) dated August 25, 1921, together with the modifications thereto dated February 3, 1927, and May 31, 1950, is ratified, confirmed, and declared to be valid.

(b) The contract between the Salt River Valley Water Users' Association and the Roosevelt Water Conserva-

tion District dated October 24, 1924, together with all amendments thereto and any extension thereto entered into pursuant to the Agreement is ratified, confirmed, and declared to be valid.

(c) The Secretary is authorized and directed to revise the subcontract of the Roosevelt Water Conservation District for agricultural water service from the CAP to include an addendum substantially in the form of exhibit "3.1" to the Agreement and to execute the subcontract as revised. Notwithstanding any other provisions of law, the Secretary shall approve the conversions of agricultural water to municipal and industrial uses authorized by the addendum at such time or times as the conditions authorizing such conversions, as set forth in the addendum, are found to exist.

(d) The Secretary is authorized and directed to execute and perform that agreement among the United States, the CAWCD, the RWCD, the Arizona cities of Chandler, Glendale, Scottsdale, Tempe, Mesa, Phoenix, and the Arizona town of Gilbert providing for the assignment of a portion of the RWCD's entitlement to agricultural water service from the CAP and other matters in substantially the form of exhibit "12.3" to the Agreement, and such agreement is hereby ratified, confirmed, and declared to be valid.

(e) The Secretary is authorized and directed, at such time as the authorizations in section 10(b)(I) become effective, to certify that the lands within the RWCD are free from the ownership and full cost pricing limitations of Federal reclamation law.

SEC. 7. COLORADO RIVER WATER EXCHANGE.

(a) On or before December 31, 1990, the Secretary shall acquire, from willing irrigation districts and their landowners (hereinafter "sellers") rights to twenty-two thousand acre-feet of annual consumptive use of water

from the main stream of the Colorado River in the State of Arizona with a contractual priority predating September 30, 1968, and which was not included by the Secretary, the Arizona Water Commission, or the Arizona Department of Water Resources in the determination of the water supplies available to the CAP for the purpose of establishing the initial allocations to non-Indian entities. Nothing in this Act shall alter the responsibilities of the United States Supreme Court in Arizona versus California, 376 U.S. 340.

(b) The Secretary is authorized, as part of consideration to willing sellers for the acquisition of water pursuant to subsection (a), to amend existing repayment contracts with the United States to which such sellers are subject to provide for the discharge of any remaining repayment obligation which the irrigation districts owe the United States as of May 30, 1987, and to certify that the lands within the irrigation districts are free from the ownership and full cost pricing limitations of Federal reclamation law.

(c) The Secretary shall contract to deliver such water to the Arizona cities of Chandler, Glendale, Scottsdale, Tempe, Mesa, and Phoenix, and the Arizona town of Gilbert, in exchange for water provided by these cities and the town to the Community, in the amounts set forth in the Agreement. Such water shall increase the supply available for delivery to CAP non-Indian municipal and industrial subcontractors of CAP water service. The terms of each water delivery contract shall be in a form mutually acceptable to the respective parties thereto and substantially similar to exhibits "3.h.1" through "3.h.7" to the Agreement, which exhibits substantially conform to the terms of the CAP municipal and industrial water service subcontracts to which each of such cities and the town are parties on the effective date of this Act, except that:

(1) there shall be no water service capital charges associated with water deliveries made pursuant to the contracts authorized by this section, except as otherwise provided in the Agreement;

(2) for the purpose of determining the allocation and repayment of costs of the CAP as provided in Article 9.3 of Contract Numbered 14-06-W-245 between the United States of America and the Central Arizona Water Conservation District dated December 15, 1972, and any amendment or revision thereof, the costs associated with the delivery of water to cities and the town pursuant to the contracts authorized by this section shall be nonreimbursable, and such costs shall be excluded from CAWCD's repayment obligation;

(3) notwithstanding the provisions of section 9(e) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(e)) and section 304(b)(2) of the Colorado River Basin Project Act (43 U.S.C. 1524(b)(2)), the term of the contracts authorized by this section shall be perpetual.

(d) Within one year of the date of enactment of this Act the cities and the town shall deposit $9,000,000 in an escrow account as provided in the Agreement for the purposes of funding the acquisition of the rights to water referred to in subsection (a). On or after the date the waiver referred to in section 10(b)(1) becomes effective, monies shall be paid out of the escrow account to the United States in accordance with the Agreement: *Provided*, That such payment shall not exceed the costs incurred by the Secretary pursuant to subsection (a) or $9,000,000, whichever is less. Any monies remaining in escrow account after payment to the United States shall be returned to cities and the town. If the waiver referred to in section 10(b)(1) do not become effective by December 31, 1991, all monies in the escrow account shall

be returned to the cities and the town in accordance with the Agreement.

(e) Neither the Salt River Valley Water Users' Association nor the Salt River Project Agricultural Improvement and Power District shall become subject to the provisions of the Reclamation Reform Act of 1982 (43 U.S.C. 390aa et seq.) by virtue of either its participation in the settlement or its execution and performance of the Agreement, including but not limited to the exchange provided for in this section.

SEC. 8. WATER DELIVERY CONTRACT AMENDMENTS; WATER LEASE.

(a) The Secretary is authorized and directed to amend the CAP water delivery contract between the United States and the Community dated December 11, 1980 (herein referred to as the "Community CAP Delivery Contract"), as follows:

(1) to extend the term of such contract to December 31, 2098, and to provide for its subsequent renewal upon terms and conditions to be agreed upon by the parties prior to the expiration of the extended term thereof;

(2) to authorize the Community to lease the CAP water to which the Community is entitled under the Community CAP Delivery Contract to the Arizona cities of Chandler, Glendale, Mesa, Phoenix, Scottsdale, and Tempe and the Arizona town of Gilbert under the terms and conditions of the Project Water Lease set forth in exhibits "3.m.1" through "3.m.7" to the Agreement for a term commencing January 1, 2000, and ending December 30, 2098;

(3) to perform the specific terms and conditions set forth in exhibit "3.j." to the Agreement.

(b) Notwithstanding any other provision of law, the amendments to the Community CAP Delivery Contract set forth in exhibit "3.j." to the Agreement and the terms and conditions of the Project Water Leases set forth in exhibits "3.m.1" through "3.m.7" to the Agreement are hereby authorized, approved, and confirmed.

(c) Consistent with subsection (d) (1) of this section, the United States shall not impose upon the Community the operation, maintenance and replacement charges described and set forth in section 7(b) of the Community CAP Delivery Contract or any other charge with respect to CAP water delivered or required to be delivered to the cities and the town pursuant to the Community CAP Delivery Contract and the Project Water Leases herein authorized.

(d) The Community and the Secretary shall lease to the cities and the town, for a term commencing on January 1, 2000, and ending December 30, 2098, and for the total consideration of $16,000,000 to be paid by the cities and the town to the Community, upon those terms reflected in the Project Water Leases set forth in exhibits "3.m.1." through 3.m.7" to the Agreement, up to thirteen thousand three hundred acre-feet of CAP to which the Community is entitled under the Community CAP Delivery Contract. The Project Water Leases shall specifically provide that—

(1) the cities and the town, each in accordance with its obligations under the Project Water Leases, shall pay all operation, maintenance and replacement costs of such water to the United States, or, if directed by the Secretary, to the Central Arizona Water Conservation District: *Provided*, That such payments shall not be commenced earlier than October 1, 1998;

(2) except as otherwise provided in the Project Water Leases, the cities and the town shall not be obligated to pay water service capital charges or municipal and industrial subcontract charges or any

other charges or payment for such CAP water other than the operation, maintenance, and replacement costs and lease payments as set forth in this subsection.

(e) For the purpose of determining the allocation and repayment of costs of the CAP as provided in Article 9.3 of Contract Numbered 14-06-W-245 between the United States of America and the Central Arizona Water Conservation District dated December 15, 1972, and any amendment or revision thereof, the costs associated with the delivery of CAP water pursuant to the Project Water Leases referred to in subsection (d) shall be nonreimbursable, and such costs shall be excluded from CAWCD's repayment obligation.

(f) Except as authorized by this section, no water received by the Community pursuant to the Agreement may be sold, leased, transferred, or in any way used off the Community's reservation.

SEC. 9. CONSTRUCTION AND REHABILITATION; TRUST FUND

(a) The Secretary is directed—

(1) pursuant to the existing authority of the Colorado River Basin Project Act (43 U.S.C. 1501 et seq.), to design and construct new facilities for the delivery of water from the Community's turnout on the CAP Granite Reef Aqueduct and from the Arizona Canal to the irrigable Community reservation lands lying north of the Arizona Canal and west of the Parker Dam Power Project power transmission line easement and to irrigable Community reservation lands south of the Arizona Canal at a cost which shall not exceed the cost for such design and construction which would have been incurred by the Secretary in the absence of the Agreement and this Act;

(2) pursuant to existing authority and obligation of the Snyder Act (25 U.S.C. 13), to deposit into the Community Trust Fund established under subsection (b)(1) $17,000,000 for the rehabilitation and improvement of the Community's existing facilities for the delivery of water to irrigable Community reservation lands lying south of the Arizona Canal and west of the Parker Dam Power Project power transmission line easement; and

(3) to deposit into the Community Trust Funds the funds authorized to be appropriated by subsection (c) for the Community to use in the design and construction of facilities to put to beneficial use the Community's water entitlement, to defray the cost to the Community of CAP operation, maintenance and replacement charges, and for other economic and community development on the Salt River Indian Reservation.

(b)(1) As soon as practicable, the Community shall establish the Salt River Community Trust Fund into which shall be deposited—

(A) by the Secretary, the funds provided in paragraphs (2) and (3) of subsection (a), and

(B) by the State of Arizona, $3,000,000 required by paragraph 20.2(b) of the Agreement.

(c) There is hereby authorized to be appropriated $30,470,000 to carry out the provisions of paragraph (3) of subsection (a).

(d) Upon the completion of the actions described in section 12(a), the Trust Fund, principal and income, may be used by the Community, in its discretion, to fulfill the purposes of the Agreement and this Act, but no part of such fund may be used to make per capita payments to members of the Community.

(e) Effective with the payments into the Trust Fund by the Secretary of the amounts required under paragraph (A) of subsection (b)—

(A) the Secretary shall have no further duties or responsibilities with respect to the administration of, or expenditures from the Trust Fund, and

(B) the United States shall not be liable for any claims or cause of action arising from the Community's use and expenditure of moneys from the Trust Fund.

SEC. 10. CLAIMS EXTINGUISHMENT; WAIVERS AND RELEASES.

(a) (1) There are extinguished—

(A) all Allottees' claims against the United States for damages for deprivation of water rights through December 31, 1991;

(B) all Allottees' claims against all persons other than the United States for damages for deprivation of water rights through December 31, 1991, for which damages are not recoverable under subparagraph (a) (1) (A) of this section; and

(C) all rights of Allottees to assert claims against the United States and all other persons for declaratory, injunctive or other relief for the determination or enforcement of water rights for allotted lands, including rights to surface water, ground water, and effluent.

(2) For purposes of paragraph (a) (1) of this section claims for water rights include all claims under Federal and State laws (including claims for water rights in ground water, surface water, and effluent) which may otherwise have been enforceable by money damages, declaratory relief, injunction, or other relief.

(3) The benefits realized by the Allottees under this Act shall constitute full and complete satisfaction of all Allottees' claims for water rights under Federal and State laws (including claims for water rights in ground water, surface water, and effluent) that may accrue after the authorizations contained in paragraph (b)(1) of this section have become effective and which would otherwise have been enforceable by money damages, declaratory relief, injunction, or other relief.

(4) Consent is given to Allottees to maintain actions, individually or as a class, against the United States in the United States Claims Court pursuant to section 1491 of title 28, United States Code, to recover damages, if any, for the extinguishment of claims effected by subparagraphs (a)(1)(A) and (a)(1)(B) of this section: *Provided, however,* That any claim for damages for rights extinguished by subparagraph (a)(1)(B) of this section shall not be joined in the same action as a claim for damages for rights extinguished by subparagraph (a)(1)(A) of this section.

(5) The United States shall have a claim only against the Community for any judgment entered against it in any action for damages for water rights extinguished by subparagraph (a)(1)(B) of this section, and the Community shall not have sovereign immunity with respect to such claim.

(6)(A) With respect to any claim against the United States which is extinguished by subparagraphs (a)(1)(A) and (a)(1)(B), the United States may assert as a defense in any action brought pursuant to paragraph (a)(4) of this section the limitation of section 2501 of title 28, United States Code, as to damages incurred more than six years before the commencement of the action, but it shall not assert a timeliness defense as to damages incurred within six years before the commencement of the action.

(B) With respect to any claim for damages for rights extinguished by subparagraph (a)(1)(B) of this section, the United States may assert as a defense any defense which the person whose liability was extinguished might have asserted in an action brought by the Allottees against him prior to the effecive date of this Act.

(b)(1) The Community is authorized, as part of the performance of its obligations under the Agreement, to execute a waiver and release of all present and future claims of water rights or injuries to water rights (including water rights in ground water, surface water, and effluent), from time immemorial to the effective date of this Act, and any and all future claims of water rights (including water rights in ground water, surface water, and effluent), from and after the effective date of this Act, which the Community may have, or which it may have standing to assert on behalf of its members and Allottees, against the United States; the State of Arizona or any agency or political subdivision thereof; or any other person, corporation, or municipal corporation, arising under the laws of the United States or the State of Arizona.

(2) In any action asserted within two years after the date of enactment of this Act by the Community against the United States in the United States Claims Court for monetary damages based upon loss or impairment of water rights the United States may assert a limitation as to damages incurred more than eight years before the commencement of the action instead of the six year limitation of section 2501 of title 28, United States Code, and it shall not assert a timeliness defense as to damages incurred within eight years before the commencement of the action.

(c) The benefits realized by the Community under this Act shall constitute full and complete satisfaction of all monetary claims against the United States for any dam-

ages alleged to accrue after completition of the requirements of section 12(a).

(d) Except as provided in paragraph (a)(5) of this section and paragraphs 17.2 and 17.5 of the Agreement, the United States shall not assert any claim against any person in its own right or on behalf of the Community based upon—

(1) water rights or injuries to water rights of the Community, it members or Allottees; or

(2) water rights or injuries to water rights held by the United States on behalf of the Community, its members of Allottees.

(e) In the event the authorizations contained in paragraph (b)(1) of this section do not become effective pursuant to section 12(a), the Community shall retain the right to assert past and future water rights claims as to all reservation lands.

SEC. 11. MISCELLANEOUS PROVISIONS.

(a) In the event any party to the Agreement should file a lawsuit in Federal District Court only relating directly to the interpretation or enforcement of the Agreement, naming the United States of America or the Comminutes as parties, authorization is hereby granted to join the United States of America and/or the Community in any such litigation, and any claim by the United States of America or the Community to sovereign immunity from such suit is hereby waived.

(b) From and after the effective date of this Act, the Salt River Valley Water Users' Association and the Salt River Project Agricultural improvement and Power District collectively are authorized to assert, on behalf of the Community, the Community's claims to spill water, as defined in the Agreement, in the General Adjudication of the Gila River System and Source currently pending in the

Superior Court of the State of Arizona in and for the County of Maricopa (hereinafter referred to as the "Gila River Adjudication"). From and after such effective date, the United States shall not prosecute a separate claim or claims for spill water on behalf of the Community in the Gila River Adjudication or in any other administrative or judicial proceeding. The United States shall not challenge any claims to spill water on behalf of the Community in the Gila River Adjudication or in any other administrative or judicial proceeding.

(c) Upon the effective date of this Act as set forth in section 12, section 302 of the Colorado River Basin Project Act (43 U.S.C. 1522) shall no longer apply to the Community.

(d) The United States of America shall make no claims for reimbursement of costs arising out of the implementation of this Act or the Agreement against any Indian-owned land within the Community's reservation, and no assessment shall be made in regard to such costs against such lands.

(e) Water received by the Cities and Town pursuant to paragraphs 10.3, 11.0, 12.2, and 19.0 of the Agreement shall not affect any future allocation or reallocation of the CAP supply.

(f) To the extent the Agreement does not conflict with the provisions of this Act, such Agreement is hereby approved, ratified, and confirmed. The Secretary is authorized and directed to execute and perform such Agreement. The Secretary is further authorized to execute any amendments to the Agreements and perform any actions required by any amendments to the Agreement which may be mutually agreed upon by the parties.

(g) Effective as of the date of enactment of this Act, and, notwithstanding the provisions of section 177 of title 25 United States Code, the Salt River Pima-Maricopa Indian Community may, as to any land outside of the Salt

River Pima-Maricopa Indian Reservation to which it holds fee title, leasehold interest or any other interest, sell, encumber, hypothecate, lease or otherwise deal with such land or interest in such land as any other owner, lessor or interest holder might, subject to the laws of the state within which the land is situated.

(h) Within thirty days after the date of enactment of this Act, the Secretary shall request the Arizona Department of Water Resources to recommend a reallocation of non-Indian agricultural CAP water that has been offered to but not contracted for by potential non-Indian agricultural subcontractors. Within one hundred and eighty days of receipt of such recommendations, the Secretary shall reallocate such water for non-Indian agricultural use, and the Secretary and CAWCD shall thereafter offer amendatory or new subcontracts for such water to non-Indian agricultural users.

SEC. 12. EFFECTIVE DATE.

(a) The authorizations contained in section 10(b)(1) of this Act shall not be effective until such time as—

(1) the Secretary has fulfilled the requirements of sections 4 and 7;

(2) the Bartlett Dam Agreement has been amended as provided in section 5;

(3) the Roosevelt Water Conservation District subcontract for agricultural water service from CAP has been revised and executed as provided in section 6(c) and the assignment described in section 6(d) has been executed;

(4) the funds required for the purpose of section 9(a)(1) have been appropriated;

(5) the funds authorized by section 9(a)(2) and 9(c) have been appropriated and deposited into the Community Trust Fund;

(6) the State of Arizona has appropriated and deposited into the Comunity Trust Fund the $3,000,000 required by paragraph 20.2(b) of the Agreement;

(7) the stipulation which is attached to the Agreement as exhibit "3.e." has been approved; and

(8) the Agreement has been modified to the extent it is in conflict with this Act and has been executed by the Secretary.

(b) If the actions described in paragraphs (1), (2), (3), (4), (5), (6), (7), and (8) of subsection (a) have not all occurred by December 31, 1991, sections 4, 5, 6, 7(b), 7(c), 8, 9(a)(2), 9(a)(3), 9(b), 9(c), 10(a)(1)(c), 10(d), and 11(a), 11(b), 11(c), 11(d), 11(e), and 11(f), and any contracts entered into pursuant to those provisions, shall not thereafter be effective, any funds appropriated pursuant to sections 9(a)(2) and 9(c) shall revert to the Treasury, and any funds appropriated pursuant to paragraph 20.2(b) of the Agreement shall revert to the State of Arizona.

SEC. 13. OTHER CLAIMS.

Nothing in the Agreement or this Act shall be construed in any way to qualify or otherwise affect the water rights, claims or entitlements to water of any Arizona Indian tribe, band or community, other than the Community.

SEC. 14. AK-CHIN.

(a) The Ak-Chin Indian Community of Arizona may make repayment of the Ak-Chin West supplemental loan by a discounted prepayment in lieu of the repayment terms and provisions contained in section 5(c) of Public Law 89-984, the Small Reclamation Projects Act. The Secretary of the Interior shall determine such amount in

a manner that will result in an equitable repayment based on the current applicable interest rate.

(b) The Ak-Chin West supplemental loan is hereby exempt from the 1986 amendments (Public Law 99-546) to the Small Reclamation Projects Act, and the requirement contained in section 4(e) of Small Reclamation Projects Act for a sixty-day congressional review of the approved loan application is hereby waived.

Approved October 20, 1988.

LEGISLATIVE HISTORY—H.R. 4102:

HOUSE REPORTS: No. 100-868 (Comm. on Interior and Insular Affairs).

CONGRESSIONAL RECORD, Vol. 134 (1988):

Sept. 13, considered and passed House.
Sept. 30, considered and passed Senate, amended.
Oct. 3, 4, House concurred in Senate amendment.

Supreme Court, U.S.
FILED
DEC 27 1991
OFFICE OF THE CLERK

No. 91-678

In the Supreme Court of the United States

OCTOBER TERM, 1991

HERMAN GREY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners are entitled by the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. No. 100-512, 102 Stat. 2549 (1988), to recover money damages from the United States for the alleged deprivation of water rights, notwithstanding petitioners' failure to demonstrate that either the Settlement Act or any other source of law created substantive rights enforceable in money damages under *United States* v. *Mitchell*, 463 U.S. 206 (1983).

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-678

HERMAN GREY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported, but the decision is noted at 935 F.2d 281 (Table). The opinion of the Claims Court in *Grey* v. *United States* (Pet. App. 3a-32a) is reported at 21 Cl. Ct. 285. The judgment order of the Claims Court in *Abel* v. *United States* (App., *infra*, 1a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 35a-36a) was entered on May 24, 1991. A petition for rehearing was denied on July 26, 1991. Pet. App.

33a-34a. The petition for a writ of certiorari was filed on October 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners own interests in allotted lands on the Salt River Pima-Maricopa Indian Reservation near Phoenix, Arizona. They brought these two consolidated actions to recover money damages from the United States. Petitioners sought recovery on the theory that various statutes and regulations imposed a trust responsibility on the federal government to deliver water to petitioners' lands from the Salt River Federal Reclamation Project (SRP or Project). The Claims Court held that the statutes and regulations upon which petitioners relied did not create fiduciary duties of the sort that would provide a cause of action for money damages under *United States* v. *Mitchell*, 463 U.S. 206 (1983). Pet. App. 3a-32a. The court of appeals affirmed. *Id.* at 1a-2a.

1. The Salt River Pima-Maricopa Indian Reservation was established by Executive Order on June 14, 1879. The Reservation encompasses approximately 51,000 acres, which are located south and west of the confluence of the Salt and Verde Rivers and which are now adjacent to the Phoenix metropolitan area. Water from the Salt and Verde Rivers is stored by the SRP. Pet. App. 7a.

The SRP had its conception in the Reclamation Act of 1902, Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. 391 *et seq.*), which authorized the Secretary of the Interior to withdraw public lands in arid areas of the country for construction of irrigation projects. The Salt River Valley Water Users' Association (Association) was

formed in 1903 to control the development of the SRP. Pet. App. 7a. In 1904, the Secretary entered into an agreement with the Association to provide for repayment of the costs of the Project. *Ibid.*; see also Act of June 17, 1902, ch. 1093, § 4, 32 Stat. 389. Under the agreement, distribution of water from the SRP was to be limited to members of the Association; the Secretary, however, retained authority to designate the lands to be served by the SRP. Pet. App. 7a.

In 1905, a lawsuit was filed in Arizona territorial court to clarify water rights in the Salt River Valley. Pet. App. 7a-8a. The United States filed claims in the litigation on behalf of the Indians on the Reservation. In 1910, the Arizona court entered what became known as the "Kent Decree." *Id.* at 8a. The Kent Decree limited the water rights of the Salt River Pima-Maricopa Indian Community to the natural flows of water, with no entitlement to the use of stored water. *Ibid.*

The SRP first became operational in 1911. Pet. App. 8a. In 1917, the Secretary transferred responsibility for operation and maintenance of the SRP to the Association; the Secretary also issued the first public notice designating lands eligible for receipt of water from the SRP. *Id.* at 10a. From 1917 to 1928, as the storage capacity of the SRP was enhanced by additional facilities, the Secretary designated additional lands for receipt of SRP waters. *Id.* at 8a-9a.[1]

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[1] The Project's water-storage facilities currently consist of six dams, four on the Salt River and two on the Verde River. See Pet. App. 8a-9a. The original facilities of the SRP included the Roosevelt Dam and the Granite Reef Diversion Dam and Diversion Canals. *Id.* at 8a. From 1917 to 1935, the Association built the Horse Mesa Dam, the Mormon Flats Dam, and the Stewart Mountain Dam, all located below the

Lands within the Reservation first became eligible for stored water from the Project in 1935, when the Secretary and the Association concluded an agreement providing SRP water to 631 ten-acre allotments on the Reservation. *Id.* at 9a-10a; see also Act of May 18, 1916, ch. 125, § 2, 39 Stat. 130.

2. In recent years, the claims of the Salt River Pima-Maricopa Indian Community (Community) and its allottees to water from the SRP have been the subject of extensive litigation in state and federal courts. Pet. App. 13a; see H.R. Rep. No. 868, 100th Cong., 2d Sess. 11 (1988).[2] The claims of the Community were eventually resolved in a settlement agreement concluded in 1988 among the Community, the non-Indian communities in the Salt River Valley, and the United States. H.R. Rep. No. 868, *supra*, at 11. In the Salt River Pima-Maricopa Indian Community Water Rights Settlement Act, Pub. L. No. 100-512, 102 Stat. 2549 (1988), Congress ratified the agreement and provided the Secretary with the authority necessary for its implementation. In addition, in the provision at issue here, Congress "prescribe[d] a procedure for resolving" the claims of individual allottees, who were not parties to the settlement agreement. Settlement Act, § 2(a)(8), 102 Stat. 2550; see also Pet. App. 23a.

Roosevelt Dam on the Salt River. In 1935, the Secretary and the SRP built the Bartlett Dam on the Verde River, and in the mid-1940s, the SRP and Phelps Dodge Corporation built the Horseshoe Dam on the Verde River above the Bartlett Dam. *Id.* at 10a-11a.

[2] Allotments of land on the Reservation were made pursuant to the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, codified as amended at 25 U.S.C. 331 *et seq.*

By incorporating the terms of the settlement agreement, the Settlement Act entitled the Community to 122,400 acre-feet of water per year from various sources, including the SRP. H.R. Rep. No. 868, *supra*, at 11. Local non-Indian interests provided part of the amount through a transfer of some of their preexisting water rights. *Id.* at 12; Settlement Act § 2(a)(9), 102 Stat. 2550. Additional water was ensured by funding authorized in the Act for rehabilitation of existing facilities and construction of new facilities. H.R. Rep. No. 868, *supra*, at 11-12; see also Settlement Act, §§ 4, 9, 102 Stat. 2551-2552, 2555-2556.

Section 10 of the Act addressed the disposition of water-rights claims by the Community and the allottees. Under Section 10(b)(1), the Community was "authorized, as part of the performance of its obligations under the [settlement] [a]greement, to execute a waiver and release" of all such claims "which the Community may have" against the United States and other parties. 102 Stat. 2257. Section 10(a), the provision at issue here, addressed the claims of the allottees. Section 10(a)(1)(A) extinguished "all Allottees' claims against the United States for * * * deprivation of water rights through December 31, 1991." 102 Stat. 2556. Section 10(a)(4) of the Act then provided in relevant part:

> Consent is given to Allottees to maintain actions, individually or as a class, against the United States in the United States Claims Court pursuant to section 1491 of title 28, United States Code, to recover damages, if any, for the extinguishment of claims effected by subpara-

graphs (a)(1)(A) and (a)(1)(B) of this section * * *.

102 Stat. 2556-2557.[3]

3. In 1984, five holders of interests in allotments on the Reservation had filed an action against the United States in the Claims Court, *Grey* v. *United States*. Pet. App. 37a-44a. They sought money damages, claiming that the Secretary had violated his duties under the Indian General Allotment Act of 1887 and various reclamation and irrigation laws and regulations by failing to deliver to their lands the full amount of water from the SRP to which they were entitled. *Id.* at 38a-41a. They relied on the Tucker Act, 28 U.S.C. 1491, as a basis for jurisdiction. Pet. App. 37a.

Shortly after passage of the Settlement Act in 1988, the Claims Court held a status conference to determine whether the *Grey* plaintiffs intended to amend their claims in light of the Act. The parties agreed that the Act had no effect on the nature of the claims before the court. C.A. App. Doc. 12, at 14. At the trial in March 1989, the parties presented evidence on two issues: "whether th[e] court ha[d] jurisdiction over plaintiffs' claims by virtue of a statute or regulation which can be fairly interpreted as mandating compensation by the federal government for failure to deliver surface water to allotted Indian lands. And if so, whether the failure to deliver water * * * to individual allottees constituted an actionable breach." Pet. App. 4a.

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[3] Subparagraph (a)(1)(B) of Section 10 extinguished "all Allottees' claims against all persons other than the United States." 102 Stat. 2556. No such claims have been asserted in the present case.

In April 1989, additional allottees on the Salt River Reservation filed a separate action against the United States, *Abel* v. *United States*, asserting claims essentially identical to those asserted by the *Grey* plaintiffs. Pet. App. 45a-67a.[4]

4. In August 1990, the Claims Court dismissed both actions.[5] Relying on *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the court held that petitioners' claims were not cognizable under the Tucker Act because none of the statutes or regulations on which petitioners relied was fairly interpreted as mandating compensation from the federal government. Pet. App. 14a-32a.

The court determined that the statutes and regulations cited by petitioners did not give the Secretary comprehensive and pervasive control over the provision of water to allotted lands sufficient to create a fiduciary relationship. Pet. App. 16a-22a. The court found that the "General Allotment Act does not impose any duty on the Government to manage the water on each individual allotment." *Id.* at 17a. Similarly, the court found that the irrigation laws and regulations cited by petitioners required the Secretary only

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[4] The *Grey* plaintiffs moved to have all allotted landowners of the Reservation certified as a class. The Claims Court denied that motion in 1985. After passage of the Settlement Act, the allottees renewed their motion for class certification, which was denied by the court. Subsequently, the Claims Court also denied the *Abel* plaintiffs' motion for class certification. See *Abel* v. *United States*, 18 Cl. Ct. 477 (1989).

[5] The court issued an opinion and judgment in *Grey* on August 9, 1990. Pet. App. 3a-32a. On August 10, 1990, the court issued a judgment order in *Abel* stating that the case was governed by the court's disposition in *Grey*. App., *infra*, 1a.

to deliver water from the SRP to designated points, and that thereafter the Tribe was responsible for the manner in which the water was distributed to individual allotments. *Id.* at 18a. The court also noted that the individual allottees had discretion "in determining when they wanted water and how much water would be used." *Id.* at 18a-19a. As a result, the court determined that "[t]he use of water on [petitioners'] lands was not subject to the extensive 'daily supervision' and control required by the [C]ourt in *Mitchell II*." *Id.* at 19a. The court then reviewed the "extensive evidence" on the government's management and control of the SRP under the Reclamation Act of 1902. Pet. App. 21a. "None of the evidence," the court found, "contemplated that the Interior Department would have complete control over water distribution." *Ibid.* The court also examined the text of the Reclamation Act and similarly concluded that "Congress did not intend to give the Secreatry [*sic*] total control of the water in the Salt River." *Id.* at 22a.

The court further determined that the Settlement Act did not create any "substantive right that would support [petitioners'] claims for failure to deliver water in the past." Pet. App. 24a. The court observed that "[n]o part of the * * * Act refers to any form of relationship between the United States and *individual allottees*." *Id.* at 23a. Instead, "[t]he Act defined the government's duty to the Indian *tribes* that constitute the * * * Community." *Ibid.* The court explained that the claims of allottees were addressed in the Act because "the non-Indian users of Salt River water resources feared subsequent litigation." *Ibid.* The Act accordingly "stated a procedure to resolve any remaining claims of individual allot-

tees and the Indian community" that were not resolved in the settlement agreement. *Ibid.* The court concluded that the Act "does not, however, create a substantive right for claims having no other jurisdictional basis." *Id.* at 27a.

Finally, the court concluded that its analysis of the applicable statutes was consistent with judicial doctrine regarding the water rights of tribal lands. Pet. App. 29a-32a. The court observed that the rights of Indian lands to appurtenant water that were recognized in *Winters* v. *United States*, 207 U.S. 564 (1908), "are communal in nature." Pet. App. 29a. The court explained that title to such water "resides in the tribe itself and is not held by individual Indians." *Id.* at 29a-30a (citing *United States* v. *Chase*, 245 U.S. 89, 99-100 (1917)). In the court's view, the statutes governing the Secretary's responsibilities for the provision of water to tribal lands here were consistent with the *Winters* doctrine, because those responsibilities ran to the Community but did not confer on individual allottees an enforceable right to specific amounts of water. Pet. App. 31a.

5. On consolidated appeal from the judgments in *Grey* and *Abel*, the court of appeals affirmed. Pet. App. 1a-2a. Finding that "[t]he Claims Court [had] meticulously considered every fact and issue raised" by petitioners, the court of appeals adopted the Claims Court's opinion. *Id.* at 2a.

ARGUMENT

Petitioners do not challenge the conclusion by both courts below that they failed to state a claim within the Claims Court's Tucker Act jurisdiction under the principles set forth in *United States* v. *Mitchell*, 463 U.S. 206 (1983). Instead, they contend (Pet. 5-7) that, as a "special jurisdictional act," the Settlement Act required the Claims Court to adjudicate their claims without regard to whether "some particular statute or other source of law mandate[d] compensation." Petitioners have it backwards. It is precisely because the Settlement Act only provided Congress's consent to the maintenance of actions for the extinguishment of water-rights claims, but did not create any substantive right to recover on those claims, that the Act, standing alone, was insufficient to support recovery in the present case.

The Claims Court correctly held that the Settlement Act did not create a cause of action for deprivation of water rights to allotted lands. Pet. App. 22a-29a. Instead, the Act extinguished water-rights claims arising under prior law and "prescribe[d] a procedure" for the allottees "to recover [the] damages, if any," caused by extinguishment of those claims. Settlement Act, §§ 2(a)(8), 10(a)(1), 10(a)(4), 102 Stat. 2550, 2556-2557. Specifically, Section 10(a)(4) of the Act provided Congress's "[c]onsent" to the maintenance of actions by allottees pursuant to the Tucker Act for the statutory extinguishment of preexisting water-rights claims. 102 Stat. 2556-2557. Thus, as the Claims Court stated, the Settlement Act merely "provide[d] a forum for resolution of valid pre-existing claims." Pet. App. 27a.

This Court's Tucker Act decisions make clear that the issue of whether Congress has consented to the maintenance of an action for damages against the United States is quite different from the issue of whether a substantive basis for the cause of action exists. *Mitchell II*, 463 U.S. at 218-219. The Tucker Act provides Congress's consent to actions for money damages "founded either upon the Constitution, or any Act of Congress or any regulation * * *, or upon any express or implied contract with the United States." 28 U.S.C. 1491(a)(1). But the Tucker Act "does not create any substantive right enforceable against the United States," 463 U.S. at 216; it "merely confers jurisdiction upon [the Claims Court] whenever the substantive right exists," *United States* v. *Testan*, 424 U.S. 392, 398 (1976). Accordingly, the plaintiff in a Tucker Act suit "must demonstrate that the source of substantive law he relies upon can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 216-217.

The same requirement applies in the present case. The Settlement Act provided Congress's consent to Tucker Act suits for the extinguishment of water-rights claims, but the Settlement Act did not provide a substantive basis for those claims. Therefore, the legislation did not relieve petitioners of the burden of establishing the validity of their claims under prior law. Like other Tucker Act plaintiffs, petitioners were required to "demonstrat[e] a substantive right enforceable against the United States for money damages." Pet. App. 2a. Having concluded that petitioners failed to "show[] an independent substantive right to money damages," *id.* at 27a—a conclusion

that petitioners do not challenge in this Court—the Claims Court properly dismissed petitioners' actions.[6]

Contrary to petitioners' contention (Pet. 7), this Court's decisions concerning "special jurisdictional acts" do not require a different result. A statute that serves only as a grant of jurisdiction, by its nature, "contains no language prejudging the validity of * * * claims on their merits." *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 163 (1958). Thus, the fact that a plaintiff alleges a claim that falls within the terms of a grant of jurisdiction does not prevent the court from examining the substantive basis for that claim. The decisions of this Court on which petitioners rely confirm this principle. In the decisions cited by petitioners (Pet. 7), the availability of compensation from the government depended upon whether the plaintiffs had stated a valid claim within the relevant grant of jurisdiction. The analysis in each case focused on the substantive source of law that was invoked as a basis for recovery.

For example, in *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945), the jurisdictional Act under which recovery was sought

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[6] In the courts below, petitioners did not rely on Section 10 of the Settlement Act as a basis for jurisdiction; they relied instead on the Tucker Act. See Pet. App. 37a, 63a. For reasons discussed in the text, the jurisdictional analysis is the same under either statute. While the Settlement Act, in effect, converted preexisting claims for deprivation of water rights into claims for the statutory extinguishment of the preexisting claims, petitioners still had the burden under the Settlement Act of proving the validity of their claims under prior law. It is therefore not surprising that counsel for the petitioners in *Grey* told the Claims Court that he did not intend to amend the complaint in light of the Settlement Act, stating: "[O]ur case today is exactly what it was in 1984." C.A. App. Doc. 12, at 14.

conferred jurisdiction on the Court of Claims to "hear, adjudicate, and render judgment in any and all claims which the northwestern bands of Shoshone Indians may have against the United States arising under or growing out of [specified treaties]." Act of Feb. 28, 1929, ch. 377, 45 Stat. 1407. The plaintiffs sought compensation for lands that they had occupied under one of the treaties specified in the Act and that had subsequently been disposed of by the government. 324 U.S. at 337, 341-346. The fact that they had invoked one of the substantive bases for recovery identified in the grant of jurisdiction did not suffice to establish their right to compensation. The "decisive question," instead, was "whether it was intended by the [treaty relied upon] to recognize or acknowledge by implication the Indian title to the lands mentioned in that treaty." *Id.* at 340. The Court upheld the lower courts' denial of compensation, concluding that "[n]owhere in any of the series of treaties [with the Shoshone tribes] [wa]s there a specific acknowledgement of Indian title or right of occupancy." *Id.* at 348.

The claim for money damages in *United States* v. *Creek Nation*, 295 U.S. 103 (1935), was based on facts and on a grant of jurisdiction similar to those before the Court in *Northwestern Bands of Shoshone Indians.*[7] The Court upheld recovery in *Creek Nation*, however, because the treaty on which the plaintiffs in

[7] The jurisdictional statute in *Creek Nation* authorized the Court of Claims to "hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe." 295 U.S. at 105, quoting Act of May 24, 1924, ch. 181, 43 Stat. 139.

that case relied gave them "a fee simple title," and not "the usual," more limited rights, such as those involved in *Northwestern Bands of Shoshone Indians. Creek Nation*, 295 U.S. at 109. The nature of the Creek Nation's rights under the treaty led the Court to conclude that "the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation." *Id.* at 111.[8]

Finally, the suit in *United States* v. *Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913), was brought pursuant to a statute authorizing the Court of Claims "to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac Band of Chippewa Indians * * * against the United States on account of losses sustained by them * * * by reason of the opening of the Mille Lac Reservation . . . to public settlement under the general land laws." *Id.* at 499, quoting Act of Feb. 15, 1909, ch. 126, 35 Stat. 619. This jurisdictional statute—by virtue of its specific reference to the plaintiffs' suit and its apparent acknowledgement of the "losses sustained" by the plaintiffs—provided a much stronger basis than does the Settlement Act for an argument that the grant of jurisdiction, standing alone, justified the recovery of damages. Nonetheless, the Court began its opinion by emphasizing that

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[8] The Court followed a similar analysis in upholding the recovery of compensation for the government's appropriation of land in *New York Indians* v. *United States*, 170 U.S. 1 (1898). As in *Creek Nation*, it did not suffice that plaintiffs in *New York Indians* alleged a claim within the terms of the special jurisdictional Act. See *New York Indians*, 170 U.S. at 2. Instead, the dispositive question concerned "the nature of the title acquired by the Indians under the treaty" specified in that Act. *Id.* at 15.

> [t]he jurisdictional act makes no admission of liability * * * on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import.

Id. at 500. The Court went on to examine the treaties and statutes governing the lands at issue. *Id.* at 500-509. It concluded that the plaintiffs were entitled to recover for the taking of a portion of the lands, because the United States had a fiduciary duty to dispose of those lands for the plaintiffs' benefit and had breached that duty. *Id.* at 509.

The Claims Court's analysis of petitioners' claims was consistent with the analysis in *Mille Lac Band* and the other decisions discussed above. The Claims Court determined that the Settlement Act merely "provide[d] a forum for resolution of valid pre-existing claims," Pet. App. 27a, and it accordingly inquired into whether petitioners had a valid claim for money damages under the other applicable statutes. Because those other statutes did not create fiduciary duties for which the government would be answerable for money damages under *Mitchell II*, the court correctly denied recovery. That holding—which turns on the particular statutes at issue here—presents no issue of general importance warranting review by this Court.[9]

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[9] The Claims Court determined that petitioners' failure to establish a right enforceable against the United States for money damages required it to dismiss petitioners' actions for

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

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lack of jurisdiction. See Pet. App. 14a. That disposition was proper. Although in other contexts a plaintiff's failure to establish a right to recover warrants a dismissal for failure to state a claim on which relief can be granted, rather than a dismissal for lack of jurisdiction, see *Bell* v. *Hood*, 327 U.S. 678 (1946), in a Tucker Act case jurisdiction exists only "when[] the substantive right exists." *United States* v. *Testan*, 424 U.S. at 398. Accord *Army & Air Force Exchange Serv.* v. *Sheehan*, 456 U.S. 728, 739 (1982) (upholding district court's dismissal of back-pay claim for lack of subject-matter jurisdiction; stating that "[a]s *Testan* makes clear, [Tucker Act] jurisdiction * * * cannot be premised on the asserted violation of regulations that do not specifically authorize awards of money damages"); see also *United States* v. *Clark*, 445 U.S. 23, 34 n.11 (1980) (because statute at issue clearly authorized recovery of money, "there is no question that the Court of Claims below had both jurisdiction to entertain [the plaintiffs'] claim and authority to grant recovery"). Having determined that petitioners had no substantive right to money damages, the Claims Court correctly held that it lacked jurisdiction under the Tucker Act. In any event, petitioners were not prejudiced by the label that the Claims Court attached to its judgment of dismissal, since the court based that judgment on a thorough examination of the substantive basis for their claims.

APPENDIX

IN THE UNITED STATES CLAIMS COURT

No. 205-89L

(Filed: August 10, 1990)

CARLTON G. ABEL, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

ORDER

In the Joint Preliminary Status Report, the parties stated that "the plaintiffs are allotted landowners on the Salt River Pima-Maricopa Indian Reservation" and agreed that the claims in *Grey, et al. v. United States*, No. 588-84L, are subsequently [*sic*] similar to the claims asserted in this action. An exhaustive review of the filings in this proceeding confirms that plaintiffs in this case are so similarly situated as those plaintiffs in *Grey* that *Abel, et al. v. United States*, No. 209-89L, is governed by the court's prior disposition of *Grey, et al. v. United States*, No. 588-84L. A copy of the court's opinion in *Grey* is attached hereto and incorporated as part of this order. Accordingly, the Clerk of the court is directed to enter judgment dismissing the complaint. No costs.

IT IS SO ORDERED.

/s/ M. R. Tidwell
MOODY R. TIDWELL
Judge